Supreme Court, U.S.
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JUL 24 1986
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CLERK

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Division of Criminal Justice

Of Counsel &
On the Petition

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Are federal courts absolutely barred from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting release will be reversed on appeal in deciding whether to stay release on habeas corpus pending appeal?

PARTIES BELOW

All parties below are parties to this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Gary Hilton, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. Cary Edwards, Attorney General of New Jersey, respectfully pray that a writ of *certiorari* issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on May 27, 1986.

OPINIONS BELOW

The order of the United States District Court for the District of New Jersey, issued without a written opinion, is reproduced in Appendix E.

The district court's stated reasons for denying the order are reproduced in Appendix F.

The Order of the United States Court of Appeals which has not been published, and was issued without written opinion is reproduced at Appendix G.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 2254, respondent petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey.

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. sec. 2253. Petitioners' motion for a stay of respondent's release on federal habeas corpus was denied by the Third Circuit Court of Appeals under *Fed. R. App. P.* 8(a) and 23(b), (c) and (d). No petition for rehearing was sought.

The jurisdiction of this Court to review the order of the Third Circuit is invoked under 28 U.S.C. sec. 1254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULES INVOLVED

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

STATEMENT OF THE CASE

Respondent was indicted on July 29, 1980, on charges of aggravated sexual assault in violation of N.J. Stat. Ann. 2C:39-5(d) (West 1940 and Supp. 1983), and the unlawful possession of a knife in violation of N.J. Stat. Ann. 2C:14-2 (West 1940 and Supp. 1983). He was tried before the New Jersey Superior Court, Law Division on January 26 through January 30, 1981 and found guilty on both charges. On March 26, 1981, he was sentenced to an aggregate term of eight years in the New Jersey State Prison with a four year parole ineligibility term. His convictions were affirmed by the New Jersey Superior

Court, Appellate Division on December 14, 1982. His petition for certification was denied by the New Jersey Supreme Court on March 1, 1983.

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey on April 26, 1985. On February 27, 1986, the Honorable Harold A. Ackerman, U.S.D.J., ordered that a writ of habeas corpus should be issued 30 days from that date. (App. A). The basis of this writ was Judge Ackerman's ruling that the state courts had violated respondent's sixth amendment right to call witnesses in his defense by enforcing *New Jersey Court Rule* 3:11-1, which requires that defendants, upon request, inform the State of the identity of any alibi witnesses which they intend to present. The Court further ruled that failure to allow the alibi witness to testify did not constitute harmless error.

Petitioners filed a Notice of Appeal from this order on March 20, 1986. (App. B.) On March 26, 1986, petitioners moved for a stay of respondent's release on habeas corpus before the district court. Judge Ackerman denied this stay on the basis of the United States Court of Appeals for the Third Circuit decision in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986). The district court noted that under the *Carter* opinion it could not consider either respondent's dangerousness or the likelihood that the order granting release will be reversed on appeal in deciding whether to stay issuance of a writ of habeas corpus pending appeal. (Appendix D at 3-7 to 4-25; 9-6 to 25; App. E).

On May 16, 1986, petitioners moved before the United States Court of Appeals for the Third Circuit for a stay of the district court writ which ordered

that respondent be released on May 20, 1986. (App. F). This motion was denied on May 27, 1986. (App. 6).

REASONS FOR GRANTING THE WRIT

In refusing to stay respondent's release on federal habeas corpus pending appeal by petitioners, the lower federal courts declined to even consider petitioners' chances of success on appeal or respondent's dangerousness to the community at large. These refusals were based on the very recent decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3rd. Cir. 1986). Petitioners assert that the standards set forth in that opinion are novel, in conflict with the opinions of other circuits, at odds with the customary practice and interpretation of controlling statutes, impractical and dangerous.

The starting point of the *Carter* opinion is the fact that a successful habeas corpus litigant is presumptively entitled to immediate release. 781 F.2d 994. Petitioners, of course, would not contest this much of the opinion. Petitioners also agree with that portion of the *Carter* opinion which states that in order to gain release a successful habeas corpus petitioner must assure the court of his presence at future federal court proceedings. *Id.* at 995. The *Carter* court, noting that it had little guidance save for the wording of *Fed. R. App. P.* 23, went on to rule, however, that the federal courts are prohibited from consideration of other factors in determining whether or not to immediately release a federal habeas corpus petitioner. In many cases, such as the one which is the subject of this petition, this crabbed interpretation

of federal statutes unnecessarily places the community at risk. The rule in question absolutely does not mandate such a result.

Petitioners do not seek relief in this court merely because we believe that the lower courts have erred in this particular case. Rather, we believe that a writ of *certiorari* is warranted because the lower courts, relying on the recent *Carter* decision, have decided a substantial federal question not previously considered by this Court in such a manner as to create a conflict between the circuits. Indeed the circuit court in *Carter* specifically stated that it had "no authoritative case law" upon which to rely (Id. at 995) and noted the conflicting opinions. (Id. at 997, n.5).

It cannot be gainsaid that the effects of this ruling are great. It is for this reason, coupled with the fact that *Carter* was an opinion of one panel of the Third Circuit, that petitioners in this case sought *en banc* review of the district court opinion which relied exclusively on *Carter*. The hazards involved in releasing a habeas corpus litigant from state custody pending appeal without any consideration whatsoever of the danger which that person may pose to the community or the chances that the order granting the writ may be reversed on appeal are obvious. *Fed. R. App. P.* 23 does not require such a risk.

It should be noted that the *Carter* court foresaw the possibility that its decision could pose a threat to the community. It ruled, however, that only state "criminal or civil" procedures could be used to alleviate this danger. *Id.* at 996. The *Carter* solution simply does not work and, as noted earlier, is not federally mandated. It will rarely be possible to have a convicted criminal civilly committed solely on the

basis of the fact that he has committed a crime or a number of crimes, even if crimes such as murder or rape are involved.[1] Moreover, state criminal confinement is no remedy. Such confinement is normally conditioned on a decision to recharge and reprosecute. These decisions are often dependent on the outcome of the federal appeal.[2] Thus, the circuit court's purported solution is little more than a restatement of the problem.

The *Carter* opinion, which the district court was required to follow, and which the Third Circuit refused to reconsider, is at variance with long-standing practice in the District of New Jersey, is not mandated by 28 U.S.C. sec. 2254 and is not in consonance with *Fed. R. of App. P.* 23. *Rule* 23 states in applicable part:

> **(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release.** Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be en-

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[1] Respondent in this case was convicted of aggravated sexual assault under *N.J.S.A.* 2C:14-2, the equivalent of common law rape with a dangerous weapon.

[2] This is particularly true in situations in which the writ is granted on the basis of the introduction of evidence which is constitutionally infirm, *e.g.*, improper identification procedures, *Miranda*-type violations, fourth amendment violations in which the State did not provide an opportunity for a full and fair hearing in State court, etc. Indeed, these tend to be the very areas in which the district court's opinions may be the least certain and the chances of success on appeal the greatest.

larged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice or either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

Sections (b) and (c) of *Rule* 23 each create presumptions which are dependent upon the outcome of the habeas corpus proceeding. Section (b) creates a presumption that if the writ is denied the prisoner will remain in the same position concerning release as he was prior to the decision on his petition. That is, at the discretion of the court he will be subject to continued incarceration unless the court feels that enlargement is appropriate under the circumstances.

Section (c) on the other hand creates a presumption that if a prisoner's conviction is found to have been obtained unconstitutionally or illegally, the prisoner will be enlarged pending review of the decision *unless* a federal court, judge or justice orders otherwise. Thus, it is presumed that a habeas petitioner who has prevailed will be released and that a non-victorious petitioner will remain incarcerated. See *Walberg v. Israel*, 776 F.2d 134, 135-136 (7th Cir. 1985). Nevertheless, at the discretion of the court, these sections permit the enlargement of a non-victorious petitioner and the continued incarceration of a victorious litigant. *Id.* at 136.

Sections (b) and (c) do not provide guidance as to what factors a court may consider in determining whether the prescriptions contained in these sections have been overcome. Since section (b) refers to enlargement, however, it would seem that the normal rules relating to enlargement pending habeas corpus would apply. Thus, a prisoner's chances of success on appeal would be an appropriate factor to consider under section (c). See *Iuteri v. Nardoza*, 662 F.2d 159 (2nd Cir. 1981). Likewise, factors such as the government's chances of success on appeal and the dangerousness of the prisoner should be considerations under section (c).

Section (d) of *Fed. R. App. P.* 23 buttresses this interpretation of sections (b) and (c). Section (d) specifies that the original order entered under sections (b) and (c) shall govern review unless special reasons for modification of the order are shown to either the court of appeals or the Supreme Court. Again, there is no explanation of what "special reasons" may be considered by the reviewing court. However, common

sense would indicate that the reviewing court's analysis of the chances that the lower court order will be reversed on appeal and of the dangerousness of the prisoner would be among these considerations.[3]

The *Carter* court's ruling (which was followed by the district court and the circuit court in this case)[4] that the prisoner's continued ability to respond to federal process or issues which relate to some other federal interest are the sole criteria which may be considered, is in conflict with the decisions of two other circuits. In *Walberg v. Israel, supra*, 776 F.2d at 136, the Seventh Circuit held that the likelihood of reconviction was a factor which could be considered in determining whether a prevailing habeas corpus litigant could be released. Moreover, in *Lewis v. Henderson*, 356 F.2d 105, 106 (6th Cir. 1966), the Court of Appeals for the Sixth Circuit considered the fact that the petitioner faced retrial on an additional charge of attempted murder as a "special reason" for denying release even prior to the enactment of *Rule*

[3] It is noted that *Fed. R. App. P.* 8(a) provides that a district court or court of appeals may stay a district court order pending appeal upon a showing of: (1) likelihood of success on appeal; (2) irreparable injury if the stay is not granted and, where relevant, (3) absence of substantial harm to other interested persons, and (4) absence of harm to the public intent. See *Hill v. Prose*, 579 *F.Supp.* 1080, 1090 (M.D. Tenn. 1983). Thus, even if factors such as success on appeal and the dangerousness of the prisoner could not be considered under *Rule* 23, they certainly could be considered pursuant to a motion to stay release under *Rule* 8.

[4] The Circuit Court simply entered an order denying the motion for a stay of respondent's release; however, since the motion addressed only issues raised in the *Carter* opinion and requested *en banc* consideration of those issues it is apparent that the denial was based on the dictates of *Carter*.

23(d). It should also be noted that the United States District Courts for the District of Delaware (a state within the Third Circuit) and the Southern District of Texas specifically have found dangerousness to be a proper consideration in determining whether to release a successful habeas corpus petitioner. *United States ex rel Taylor v. Redman*, 500 F.Supp. 453, 459 (D. Del. 1980); *Sellars v. Estelle*, 450 F.Supp. 1262, 1265 (S.D. Tex. 1978). *Cf. Hill v. Rose*, 579 F.Supp. 1080 (M.D. Tenn. 1983); *Eagle v. Davis*, 520 F.Supp. 297 (E.D. Tenn. 1980), aff'd 633 F.2d 1070 (6th Cir. 1981). These courts have found that bail-type considerations are appropriately weighed when considering release on appeal following a successful petition for release on habeas corpus.

The Third Circuit noted that its opinion in *Carter* conflicted with the prevailing authority. 781 F.2d at 997 n.5. It diverged from the opinions of the other circuits for two reasons. First, these opinions referred to the term "bail", and the *Carter* court found that "the term 'bail' in the federal habeas corpus context is a misnomer." *Id.* Secondly, the Third Circuit found that it had no explicit authority to consider the factors considered by the other circuits due to the fact that it was ". . . provided not with a detailed statutory scheme concerning the disposition of prisoners fully subject to federal authority, but rather a sparsely worded rule . . . ." *Id.* Petitioners suggest that the rule in question entrusts the federal courts with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner. Nevertheless, in this case the district court has relied on, and the Third Circuit has refused *en banc* reconsideration of, a recent opinion in which the court

itself noted it had created a conflict among the circuits, and which was based solely on its reading of a "sparsely worded rule" which has not been interpreted by this Court. In so doing it has imposed an unduly restrictive interpretation on the rule in question.

Petitioners assert that the Third Circuit's interpretation fails to pay heed to the clear intent of the rule in question and creates an unnecessary and intolerable danger to the community. It is simply not wise or necessary to require federal courts to blindly order the release of state prisoners in situations in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great. Based upon these arguments and the facts that there is a conflict between the circuits and that this is an important issue which has not previously been decided by this court, petitioners request that this Court grant a writ of *certiorari* to review the decision of the United States Court of Appeals for the Third Circuit.

CONCLUSION

Based upon the foregoing reasons this petition for *certiorari* should be granted. The lower federal courts should be permitted to consider factors such as the habeas corpus petitioner's dangerousness to the community and the chances that the order granting release will be reversed on appeal in deciding whether to stay release from state custody pending appeal.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Petitioners

BY: /s/ ALLAN J. NODES
ALLAN J. NODES
Deputy Attorney General
Attorney of Record

ALLAN J. NODES
Deputy Attorney General
Division of Criminal Justice
Appellate Section

Of Counsel and on the Brief

DATED: July 24, 1986

APPENDIX

TABLE OF APPENDIX

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APPENDIX C	NOTICE OF MOTION FOR STAY OF RELEASE AN *HABEAS CORPUS*, dated March 21, 1986.
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APPENDIX F	NOTICE OF MOTION TO UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT FOR STAY OF DISTRICT COURT WRIT ORDERING RELEASE, dated May 16, 1986.
APPENDIX G	ORDER OF UNITED STATES COURT OF APPEALS, dated May 27, 1986.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 85-2008

DANA BRAUNSKILL,

Petitioner,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and IRWIN I. KIMMELMAN, Attorney General of New Jersey.,

Respondents.

ORDER

For the reasons set forth in this court's opinion filed this date;

It is on this 27th day of February, 1986;

ORDERED that the petition for writ of habeas corpus is hereby granted; and

IT IS FURTHER ORDERED that the state has a reasonable time in which to retry petitioner and that a writ of habeas corpus shall unless within 30 days the State of New Jersey shall afford petitioner a new trial.

/s/HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
U.S.D.J.

APPENDIX B

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
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P.O. BOX CN086
TRENTON, NEW JERSEY 08625
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER:

CIVIL ACTION

NOTICE OF APPEAL

Notice is hereby given that W. Carey Edwards, Attorney General of the State of New Jersey, et al., respondents

above, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order that a Writ of Habeas Corpus shall issue in this action 30 days from such Order which was entered on the 27th day of February, 1986.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Movant-Appellant

BY: /s/RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 20, 1986

APPENDIX C

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

PLEASE TAKE NOTICE that the undersigned will move, on short notice, before the Honorable Harold A. Ackerman, U.S.D.J., in the United States Courthouse Newark, New Jersey, on the 26th day of March, 1986 at 3:30 p.m. or as soon thereafter as counsel can be heard, for an Order: staying entry of the Order of February 27, 1986 that a Writ of Habeas Corpus shall issue 30 days from that date, pending determination of this matter by the United States Court of Appeals for the Third Circuit. Reliance will be placed on the accompanying affidavit in support of this motion.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANT

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 21, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 85-2008
TRANSCRIPT OF PROCEEDINGS

DANA BRAUNSKILL,

Plaintiff,

vs.

GARY HILTON, Warden of the State of New Jersey,

Defendant.

Newark, New Jersey
March 26, 1986

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

JOHN F. MC MAHON, Federal Public Defender,
BY: JACQUELINE TURNER,
Assistant Federal Public Defender,
For the Plaintiff.

W. CARY EDWARDS, Attorney General of New Jersey
BY: RAYMOND S. GURAK,
Deputy Attorney General of New Jersey
For the Defendant.

THE COURT: May I have the appearances, please?

MR. GURAK: Raymond S. Gurak, Deputy Attorney General for New Jersey.

MS. TURNER: Jacqueline Turner, Assistant Federal Public Defender, for defendant David Rothstein.

THE COURT: Mr. Gurak, you're here today for what?

MR. GURAK: To seek a motion for a stay of your order for enlargement of petitioner Dana Braunskill.

THE COURT: On what ground?

MR GURAK: That's the question, your Honor.

THE COURT: That's the question I'm asking.

MR. GURAK: And the answer is for the special phases of likelihood of success on the merits.

THE COURT: That's not a reason.

MR. GURAK: It's not a reason. It is not a cognizable reason under Carter.

THE COURT: No. Under Carter the only reason is the possibly of flight.

MR. GURAK: The possibility of flight would be substantiated in this case also, your Honor.

THE COURT: Well, substantiate it.

MR. GURAK: Because this petitioner has a long prior record. And we feel that it is quite likely that he would ???? the jurisdiction given his less than though prior record and he would be cognizant of the fact that if our appeal was successful he would be compelled to serve the remainder of his term as well.

Your Honor looks perplexed.

THE COURT: I'm asking for some substantiation of that. Certainly there was nothing in your papers to even remotely indicate that.

MR. GURAK: Well, my papers, your Honor, cited the cases that dealt with the four factors that could possibly

be used to substantiate special reasons for staying an enlargement order.

THE COURT: Have you read the Court of Appeals recent decision in the Carter case?

MR. GURAK: Yes, I have. It is our office's position that notwithstanding that opinion—

THE COURT: Notwithstanding that opinion?

MR. GURAK: Yes.

THE COURT: What do you mean, "notwithstanding"? You mean I should ignore that opinion?

MR. GURAK: No, no. We feel that that opinion dealt with a specific factual instance wherein the State attempted to argue that stay would be granted in that case on the ground of dangerousness. And we feel that the Court in that decision did not preclude other factors from substantiating the special reason sufficient to grant the stay.

THE COURT: Show me where in that opinion that can be found.

MR. GURAK: I will attempt to do so. I have a Xerox copy. And I don't have page numbers on it, but under Subsection (b) of the opinion, on the right-hand side of the page just above Roman Numeral 2, there is one full paragraph. And it says, quote, It is rather that we must interpret Rule 23(d) to be consistent with federalism and comity concerned and these concerns dictate that at least in this case. The special reason presented; i.e., dangerness, is one that is particularly within the authority of the State to recognize and act upon.

THE COURT: May I read what Judge Garth said to us, which I think is more pertinent on behalf of the Third Circuit.

"Our holding that a federal court in viewing the release of a State habeas primmer who has prevailed on his con-

stitutional claim should consider only those factors which bear on guaranteeing the future presence of the petitioner does not leave the statement without recourse."

Now, the State in that case, as I read it, was told by the Court of Appeals that if it considered, as it did, Mr. Carter to be dangerous, it could go to the state courts.

I, of course, am empowered to enlarge the time if I find that there is some doubt as to Mr. Braunskill's future presence. The only point I wanted to make to you at this time is in your papers there was no indication whatsoever as to that ground. Is that correct?

MR. GURAK: As to the ground of dangerousness?

THE COURT: As to the ground that he might not be around if there was a reversal by the Third Circuit.

MR. GURAK: Right. That's true. There was no factual argument in our papers. We solely cited the case law dealing with the four factors and you have that.

THE COURT: How many more years does he have to go or have to serve, to be more precise?

MR. GURAK: He has approximately about four years to go. But he is scheduled for a parole date hearing in August.

THE COURT: In August?

MR. GURAK: In August, yes.

THE COURT: Now, you say that you feel that the fact that he has this time to serve and he has a lengthy criminal record—would you enlarge upon that theme? Tell me about his record.

MR. GURAK: I would have to refer to my papers.

THE COURT: You go right ahead, sir.

MR. GURAK: I will review this briefly; his adult history.

THE COURT: Go right ahead, sir.

MR. GURAK: In 1979 received a DP for invading privacy as a peeping Tom.

THE COURT: "DP" is disorderly persons?

MR. GURAK: That's correct.

THE COURT: As a peeping Tom?

MR. GURAK: Peeping Tom.

THE COURT: What was the sentence imposed by the Court and what was that Court, if I may?

MR. GURAK: That was a 90-day sentence to the Essex County Jail. Well, that's his prior adult record.

THE COURT: You consider that a lengthy criminal record?

MR. GURAK: Well, he has a lengthy juvenile record as well. And juvenile records can be considered to some extent in deciding whether or not a particular defendant may or may not flee a jurisdiction.

THE COURT: How old is this gentleman?

MS. TURNER: I'm not sure. I believe he's around 30. Late 20s, early 30s.

THE COURT: May I assume whatever record he amassed—I'll question you about it in a moment—was approximately at least 16 years ago? Would that be a fair assumption on this Court's part?

MR. GURAK: That would be, your Honor.

THE COURT: You want to tell me about his juvenile record now that we have carefully examined his adult record and found a 90-day sentence for being a peeping Tom, which is hardly a lengthy criminal regard by any reasonable standard.

MR. GURAK: I will admit to that, your Honor.

In 1976 he was charged with robbery.

THE COURT: He was charged with robbery?

MR. GURAK: Charged with robbery. There was a remand to Overbrook Hospital for examination.

THE COURT: To what?

MR. GURAK: Overbrook Hospital.

THE COURT: That's a psychiatric hospital?

MR. GURAK: Yes, it is.

THE COURT: What happened to that case?

MR. GURAK: As I look at it now, that was dismissed as well.

THE COURT: What else?

MR. GURAK: I'm still hunting, your Honor.

The others just—there was two with fines and others were dismissed as well.

THE COURT: Mr. Gurak, what lengthy criminal record does this man have?

MR. GURAK: I would have to say I was in error by making that statement, your Honor. I did look at that prementence report rather quickly without—and I apologize to the Court for that.

At this point in time I feel that the only thing the State would be able to argue would be that the facts of this particular case substantiate that this particular petitioner has at this time committed a very serious crime. On that basis, his dangerousness is established and we feel he has made a substantial move from his minor prior record to that of a serious offender in the state of New Jersey. And on that basis we feel that there is a reasonable likelihood

that he would not show up for the case he would have to in the future proceeding.

THE COURT: What is your name?

MS. TURNER: Jacqueline Turner, your Honor.

THE COURT: Good morning.

MS. TURNER: Basically, your Honor, what we have here is a defendant who has been held on an unconstitutional conviction for the last five years.

There's a—the question is: Did Mr. Braunskill attack this woman? That has always been the question central you. And your Honor ruled the conviction of what he was doing that is affirmed.

As Mr. Gurak admits, there's really no prior record. DP quite a while ago. Ninety days in jail. Mr. Braunskill was admitted on bail pretrial. He should showed up for his trial.

The allegation he would flee after having a few months left to spend in jail at worst has not been substantiated by the State. I remind the Court it's a heavy burden on the State to stop you from enlarging Mr. Braunskill. I maintain they have not met, your Honor. Your opinion was thorough. It was based on ample precedent. It was a narrow issue. Was very likely to be upheld in the Third Circuit on appeal.

There is no clear evidence of future dangerousness and/or likelihood of flight. He appeared during pretrial and during the trial at all times. Given the fact the burden is a heavy one on the State, I would ask your Honor that the stay be denied.

THE COURT: I'm going to deny the stay. I have not been furnished with any reasons whatsoever as to why this Court should enlarge its order related to Mr. Braunskill.

The State this morning, in response to the Court's questions, cited a lengthy criminal record. As the record clearly reflects, I questioned the Deputy Attorney General concerning this matter and that assertion was just erronous as the Deputy Attorney General now admits.

The Deputy Attorney General further argues that Mr. Braunskill is dangerous. For reasons which were amply set forth by the Court of Appeals very recently in the matter of Carter and Artis versus Rafferty, this is a matter that the State can bring to the attention of the state courts if it cares to. And I need not dwell on that theme, since Judge Garth, speaking for the Court of Appeals, did so.

Originally, as the Court noted, under the prior rule release was mandatory. Now, there are—the rule has been amended and I find no special reason here citing to the rule which would reasonably allow me to conclude that Mr. Braunskill is not going to show up in case my decision is overturned. Therefore, the relief sought today by the State is denied.

Yes, Mr. Gurak.

MR. GURAK: Your Honor, if I may respectfully ask, with regard to the first part of my presentation, about the interpretation of Carter as to what would constitute a special reason, respondent still submits, your Honor, that likelihood of success on the merits would be cognizable as a special reason. And on that basis, your Honor, I would respectfully request a conditional stay be granted so that we may file our papers by four o'clock tomorrow afternoon in the Third Circuit on this matter.

THE COURT: Wait a second. Today is the 26th of March.

Now, my order, which was issued on the 27th day of February, stated: "Ordered that petition for writ of habeas corpus is hereby granted and further ordered that the

State has a reasonable time in which to retry petitioner that a writ of habeas corpus shall issue unless within 30 days the state of New Jersey shall afford petitioner a new trial."

I'm denying you the relief you seek today for a stay. If you want to go to the Court of Appeals to seek further relief in that regard, that's the State's prerogative.

MR. GURAK: Thank you, your Honor.

THE COURT: You're quite welcome. Good morning.

MR. TURNER: Thank you, your Honor.

APPENDIX E

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
BY: RAYMOND S. GURAK
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
P.O. BOX CN086
TRENTON, NEW JERSEY 08625
(609) 292-9086

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey
Movant-Appellants.

FILED
MAR 26, 1986

CRIMINAL ACTION

ORDER

It is on this 26th day of March, 1986 that movant-appellants' motion for a stay of the Order that a Writ of

Habeas Corpus shall issue, 30 days from February 27, 1986, is denied.

/s/ HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
Hon. Harold A. Ackerman, U.S.D.J.

APPENDIX F

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS
BY: RAYMOND S. GURAK
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(609) 292-9086

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 86-5204

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

CIVIL ACTION
MOTION IN BANC
(for a stay of order)

PLEASE TAKE NOTICE that the undersigned, will move *en banc* on an expedited basis, before the United States Court of Appeals for the Third Circuit for an Order: staying entry of the order of February 27, 1986, that a Writ of Habeas Corpus releasing petitioner shall issue 30

days from that date, pending determination of the direct appeal of this matter by this Court. This motion is not moot since petitioner is otherwise incarcerated for another conviction until May 20, 1986. Reliance will be placed on the accompanying brief and appendix in support of this motion *en banc*.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: May 16, 1986

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

May 16, 1986

DANA BRAUNSKILL
vs.

GARY HILTON, WARDEN AND STATE OF NEW JERSEY
W. CARY EDWARDS, Attorney General of the State of New Jersey, *et al.*,

Appellants

(N.J. D.C. Civil 85-2008)

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges.*

1. Appellants' motion in banc for a stay of the District Court's order dated February 27, 1986, pending appeal *and* Brief and Appendix in support of motion, *and* letter dated May 16, 1986, in which it states that appellee is scheduled to be released on parole from state custody on another conviction on the morning of May 20, 1986,

in the above-entitled case(s).

Respectfully,

Deputy Clerk 7-1092

enc.
dt
P.S. Appellants' brief and appendix are due June 21, 1986.
The foregoing Motion is DENIED.

By the Court,

/s/ ALDISERT
ALDISERT
JA 493 Chief Judge

Dated: May 27, 1986
ad/cc: Raymond S. Gurak, Esq.
Jacqueline E. Turner, Esq.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No. 86-108 (7)

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, JR., Attorney General
of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ALFRED A. SLOCUM
Public Defender of New Jersey
Attorney for Respondent

BY: MARK H. FRIEDMAN
Assistant Deputy Public Defender
20 Evergreen Place
East Orange, New Jersey 07018
(201) 266-1800

Of Counsel and On the Brief
for Respondent

22

QUESTION PRESENTED

Should this Court use this interlocutory matter as a vehicle for examining the holding in Carter v. Rafferty, 781 F.2d 993 (3rd Cir. 1986) in the absence of any showing by petitioners that there is any possibility that they can show "special reasons" for stay or revocation of respondent's enlargement even if the Carter interpretation of F.R.App.P. 23(c) and (d) is rejected in favor of their own?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

No. 86-108

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, JR., Attorney General
of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Dana Braunskill, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the order of the United States Court of Appeals for the Third Circuit entered in this case on May 27, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey in this matter is reported as Braunskill v. Hilton, 629 F.Supp. 511 (D.N.J. 1986).

STATEMENT OF THE CASE

Respondent adopts the statement of the case contained in the petition for certiorari* with one exception. Respondent was not convicted of aggravated sexual assault as charged in the indictment. Rather, he was acquitted of aggravated sexual assault and convicted of the lesser offense of second-degree sexual assault. N.J.S.A. 2C:14-2c.

Respondent also wishes to add the following: He was released from Trenton State Prison on May 20, 1986. Appellants' brief was filed with the United States Court of Appeal for the Third Circuit on June 23, 1986. Appellee's responding brief was filed on July 24, 1986. Counsel for respondent has been advised by the Clerk of the Third Circuit Court of Appeals that the case will be submitted to that court on October 27, 1986.

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* References to the appendix to the petition for certiorari in this brief will adhere to the form used in the petition itself ("App. ____"). References to the petition itself will be cited as "P___" with the appropriate page and line numbers.

REASONS FOR DENYING THE WRIT

Petitioners have requested that certiorari be granted in this matter in order to challenge the Third Circuit's refusal to consider en banc the interpetation of F.R.App.P. 23(c) and (d) set forth in Carter v. Rafferty, 781 F.2d 993 (3rd Cir. 1986), and to revoke respondent's enlargement, which took place on May 20, 1986. Respondent submits that this Court should deny the petition for certiorari because the orders entered below denying the motion for stay or revocation of respondent's enlargement turned primarily on this case's individual facts rather than on the legal reasoning that may or may not distinguish the Carter holding from other cases. Furthermore, even if this case is viewed solely as a straightforward application of Carter, that case presents an interpretation of the scope of Rule 23(c) and (d) that is faithful to relevant precedent, amply supported by common sense and logic, and not in conflict with decisions of other circuits.

Even a cursory reading of the petition for certiorari should convince this Court that petitioners' legal arguments exist entirely in a vacuum; the reasons put forth for granting the writ do not include any serious argument whatsoever that the instant matter presents a situation "in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great." (P 13-12 to 15) Yet surely in an interlocutory matter of this sort, the petitioner should have the burden of showing (or, at least, the evidence when fairly viewed should disclose) that the result below might be different if their interpretation of Rule 23(c) and (d) were adopted by this Court and the case was remanded for further proceedings. "We do not

suggest that district courts should grant even brief 'turn-around' stays when appeals are frivolous, or when justice requires that no further delay take place." LaFrance v. Bohlinger, 487 F.2d 506 (1st Cir. 1973). Petitioners' apparent reluctance to discuss the record set forth in the appendices to their petition is understandable because it is clear that respondent's enlargement could not and would not be stayed or revoked even if the very factors they rely on are applied to the case.

Although the district court recognized that its discretion concerning the grant or denial of a stay was defined by Carter, supra, the fact is that it gave the State a full and fair opportunity to substantiate its claim that defendant was a danger to the community. (App. D. at 2-26 to 28; 4-25 to 28) The State initially pointed to respondent's alleged "long prior record" as support for its claim (App. D. at 2-19 to 25); after closer inspection of respondent's presentence report, however, the Deputy Attorney General had to admit that "I was in error by making that statement" because his offense history only disclosed a prior adult disorderly persons conviction (the equivalent of a non-indictable common-law misdemeanor) in 1979 and a juvenile complaint for robbery that had been dismissed in 1976. (App. D. at 5-1 to 6-22) He then argued that "the facts of this particular case substantiate [that respondent] committed a very serious crime. On that basis, his dangerousness is established..." (App. D. at 6-23 to 27) Although it did not address this point specifically, the district court obviously rejected it as a basis for granting a stay, as well it should have. Cagle v. Davis, 520 F.Supp. 297, 312 (E.D. Tenn. 1980), aff'd 663 F.2d 1070 (6th Cir. 1981)(fact that petitioner may

have to be retried on a capital offense does not justify a stay of enlargement per se). See also United States ex. rel. Barnwell v. Rundle, 461 F.2d 768, 770 (3rd Cir. 1972). Thus, it is apparent that the record below is devoid of any credible evidence that respondent's enlargement conceivably "places the community at risk" (P 7-1 to 3), and a remand for consideration of that factor would inevitably result in denial of petitioners' motion for revocation on that basis.

A similar conclusion must be reached regarding any claim based upon petitioners' chances of success in the appeal of the district court's order granting respondent's petition for a writ of habeas corpus. Such a rationale for refusing to enlarge a prisoner whose confinement has been adjudged to be illegal or unconstitutional has traditionally been disfavored in any event:

> I can conceive of no principle upon which, after an imprisonment has been adjudged to be illegal, a party can be restrained of his liberty without some new and legal process, so long as the judgment stands. It is said, however, that if these proceedings are not stayed, the relator will be discharged from his imprisonment and will leave the country, and therefore a reversal of the final order would be of no effect. All that may be very true, but yet there is no presumption that there will be a reversal, but the contrary, and the claim of the right to keep this man longer in imprisonment is based simply upon the contention of the district attorney that the law will be held differently by the court of appeals. But until it is so held the discharge is legal.

People ex rel. Young v. Stout, 10 Misc. 247, 31 N.Y. Supp. 421, 1 N.Y. Annot., Cas. 53 (1894), aff'd. without opinion, 144 N.Y. 699, 39 N.E. 858 (1894). Turning to the case at bar, the opinion of the district court below itself rebuts the notion that petitioners have a "great" chance of reversal on appeal far more eloquently than respondent's attorney can. In brief, respondent was denied the

opportunity to call his sole alibi witness in his defense because his attorney filed the notice of alibi out of time. He was precluded from calling the witness even though the prosecutor knew the witness' identity and had actually interviewed the witness a week prior to trial. Significantly, on appeal in the Third Circuit petitioners are not contesting the district court's ruling that respondent's Sixth Amendment right to call witnesses on his behalf was violated; instead, they only take issue with the ruling that this error was not harmless beyond a reasonable doubt, notwithstanding the fact that it took the jury two and a half days to reach a verdict in a case that took only one day to try. Respondent respectfully submits that the district court's opinion clearly indicates that petitioner's chances for obtaining reversal of the granting of the writ on appeal are minimal to non-existent.

In sum, respondent contends that the foregoing facts, when placed in the context of the procedural history of this matter, cast severe doubt on petitioners' assertion that "the motion [for stay of enlargement] addressed only isuess raised in the Carter opinion [and] it is apparent that the denial [of en banc consideration] was based on the dictates of Carter." (P 11, n. 4) Although the motion filed on May 16, 1986 (App. F) did ask for en banc review of the holding in Carter, the brief and appendix filed in support of the motion mirrored the arguments in the district court because it also sought to persuade the Third Circuit that revocation of enlargement was justified under either the Carter test [possibility of flight by respondent] or the four-pronged test that petitioners favor (P 11, n. 3). The Third Circuit denied the motion on May 27, 1986, without even waiting for respondent to file a brief in response.

(App. G) In so doing, the Third Circuit acted with full cognizance of the record possessed by this Court and more. The dispatch with which petitioners' motion was rejected strongly suggests that the refusal to grant en banc consideration was motivated more by the Third Circuit's belief that this case was an unsuitable vehicle for examination of the Carter holding than by mere adherence to the holding or reasoning behind the opinion itself. Any such conclusion by the circuit court is nearly compelled by the instant record and should form the basis per se for denial of a writ of certiorari.

Even if this Court is prepared to ignore what respondent contends is the overwhelming evidence that the orders denying petitioners' motions below turned on this case's particular facts, it should still deny the writ because the Carter opinion construes Rule 23(c) and (c) in a legally and logically proper manner and interprets the rules in a way that does not create conflict with other circuits. It must be kept in mind from the outset that the task that the Carter court set for itself was to interpret the rules by reference to factors that "have...relevance to the federal function in habeas cases." Carter, supra at 997. That task is consistent with the emphasis on principles of federalism and comity that has been a highlight of this Court's approach to habeas cases in general. Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977). It also bespeaks recognition of this Court's belief that the scope of federal authority in habeas cases "is sometimes as much a matter of allocation as it is of analysis" and that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, ____ U.S. ____, 106 S.Ct. 445, 452 (1985). The holding that

"the 'special reasons' to which Rule 23(d) refers must, at the very least, embrace those matters which are related to an assurance that the petitioner will appear in response to federal court orders," Carter, supra at 995 (emphasis added), is by its own terms not exclusive; indeed, the court went on to hold that factors such as dangerousness to the community could be considered if they related "to a petitioner's ability to respond to federal process, or which in some other respect relate to the federal interest." Id. at 996-997. Thus the Carter holding does not "require federal courts to blindly order the release of state prisoners" in any given situation. (P13-10 to 13)

Petitioners repeatedly assail the Carter holding as "impractical," "dangerous," "crabbed," and "at odds with... customary practice." Yet it is petitioners who actually fail "to pay heed to the clear intent of the rule in question" (P 13-8 to 9) by ignoring the detailed historical and legal analysis contained in the Carter opinion. By far the most important precedent that Carter draws support from is United States ex rel. Thomas v. New Jersey, 472 F.2d 735 (3rd Cir. 1973), which contains a thorough history of Rule 23(c) and (d) and is cited as the most authoritative interpretation of the key provisions of the rule in nearly every case cited in the petition for certiorari. As noted in that opinion, release of successful habeas petitioners was mandatory until 1967. At that time limited discretion was given to the federal courts and the term "special reasons" was inserted in the Rule.

> But it is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody

> pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement.

Id. at 743.

Another change made in the Rule was the deletion of the phrase "for appearance to answer the judgment of the appellate court." However, as Thomas pointed out, "no change in substance was intended"; the federal court is still "naturally interested in the availability of the petitioner to respond to its judgment." Id. See also LaFrance, supra at 508. It was this strong interest which formed the basis of the Carter opinion. By focusing on the federal interest in the petitioner's response, the Third Circuit has been able to protect this federal interest without unduly infringing upon traditional state concerns -- protection of state citizens, particular state bail provisions and the functioning of state judicial systems. The Carter approach achieves an equitable federal/state balance in this area.

Unquestionably, the most significant facet of Rule 23(c) as well as the cases that construe it is the heavy presumption in favor of releasing a habeas petitioner once a district court has ruled in his favor. Carter, supra at 994; Thomas, supra at 743; Barnwell, supra at 770. Although petitioners pay lip service to this presumption (P 6-18 to 22), they ignore its basis, i.e., since the initial decision granting the writ means that the petitioner has been imprisoned in violation of his constitutional rights. There is no other basis for the grant of the writ. Thus every day that he continues to be incarcerated is another day that the State has deprived him of his liberty without due process of law. The significance of this fact was described by Justice (then Judge) Cardozo in characteristically eloquent fashion:

> It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty. 'The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.' ...Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer... Little would be left of 'this, the greatest of all writs' ...if a jailer were permitted to retain the body of his prisoner during all the weary processes of an appeal....

People ex rel. Sabatino v. Jennings, 248 N.Y. 258, 158 N.E. 613, 614 (Ct. App. N.Y. 1927), quoted in Cagle v. Davis, supra at 311. While petitioners may have lost sight of this element of habeas jurisprudence, the cases upon which they rely in their petition certainly did not. It is important to note that in none of the district court cases cited in the petition (P 12-6 to 12) was petitioners' enlargement stayed or revoked; at worst, the factors considered by those courts led them to condition enlargement on the posting of a surety sufficient to ensure petitioner's availability to federal process. See United States ex rel. Taylor v. Redman, 500 F.Supp. 453, 460 (D. Del. 1980)(writ granted on double jeopardy grounds; prisoner released); Sellars v. Estelle, 450 F.Supp. 1262, 1265 (S.D. Texas 1978) (writ granted; prisoner released on own recognizance after 14 years in prison); Hill v. Rose, 579 F.Supp. 1080, 1090 (M.D. Tenn. 1983)(writ granted; execution of appearance bond required); Cagle v. Davis, supra at 312-313 (writ granted; surety required "to assure [his] return to the custody of the state of Tennessee").

Carter, supra at 997, correctly points out that its ruling "does not leave the state without recourse" to resort to the state courts for vindication of traditional state

concerns. See also Thomas, supra at 743-744. Petitioners respond merely by claiming that resort to state civil commitment or pre-trial bail mechanisms is difficult if not impractical. (P. 9 to 10) Such complaints beg the essential question of whether or not the factors relied on in the petition for certiorari are more properly the concern of state courts rather than federal courts that have granted habeas relief. The fact remains that nothing "prevents the State from dealing with a habeas releasee who will be retried as the State will deal with any other State prisoner who has yet to stand trial." Carter, supra at 998. In any event, the difficulties faced by petitioners are nothing compared to the prejudice that would be suffered by respondent, who "is threatened with immediate irreparable injury in the form of continued unlawful incarceration if he is not immediately released." Taylor, supra at 460. Since respondent was eligible for parole only three months after his enlargement became effective under his original sentence (App. Da 4-20 to 24), granting of the requested stay would have meant that in practical terms he would have had to serve the entire custodial sentence imposed pursuant to his unconstitutionally-obtained conviction before the appeal of the district court's order granting the writ was completed.

Petitioners opine that the Carter opinion's construction of Rule 23(c) and (d) is erroneous because those rules should be read in light of Rule 23(b) simply because all three rules use the word "enlargement." (P 10-14 to 23) In fact, the tenets of Carter have nothing to do with Rule 23(b). That particular rule is not even cited in the Carter opinion. That omission is understandable -- Rule 23(b) deals with an entirely different legal situation and embodies entirely different legal standards. It covers unsuccessful petitioners whose State convictions remain

valid. Under those circumstances, continued incarceration is up to the discretion of the court. Aronson v. May, 85 S.Ct. 3, 5 (1964)(Douglas, J.); Petition of Johnson, 72 S.Ct. 1058, 1031 (1952)(Douglas, J.); Ostrer v. United States, 584 F.2d 594, 599 (2nd Cir. 1978). The drafters of Rule 23 certainly understood this distinction and made release presumptive only in Rule 23(c) cases. Petitioners' application of Carter to Rule 23(b) is their own invention and does not impact upon the interpretation of a completely different court rule.

Petitioners also attempt to finesse Rule 23(c) completely by implying that the standards for stays provided in F.R.App.P. 8(a) should apply to cases involving grants of writs of habeas corpus (P 11, n. 3). No case cited by petitioner clearly supports the proposition that Rule 8(a) should apply to the release of successful habeas corpus petitioners, in place of Rule 23(c) and (d). While it is true that the rules of civil procedure can be applied to habeas corpus actions, they are not to be applied when specific habeas corpus rules have been enacted, as is the case with Rules 23(c) and (d). See Harris v. Nelson, 394 U.S. 286, 294 (1969) in which this Court stated, "The practice in the federal courts has conformed with civil practice only in a general sense." See also Jago v. United States Distr t Court, et. al., 570 F.2d 618, 620 (6th Cir. 1978); Barnwell, supra at 769. In Hill v. Rose, supra, the case cited by petitioner, the district court initially considered the question of releasing the petitioner by relying on Rule 8(a). However, in its supplemental opinion, the Court decided the issue by relying on Rule 23(c), stating: "The release of a prisoner pending review of a decision

ordering his or her release by writ of habeas corpus is governed specifically by Rule 23(c), Fed. R. App. P." Id. at 1091. In fact, in a footnote in the opinion, the district court expressed some irritation at the fact that this action was brought under the wrong rule. Id. See also, King v. Zimmerman, 632 F.Supp. 271, 278 (E.D. Pa. 1986).

Petitioners make much of the fact that in Carter, supra at 997, n. 5., the court acknowledged its disagreement with other decisions that "have held that more general 'bail' standards may be considered by a court in regard to the release of a prevailing habeas petitioner." Such an acknowledgement, however, does not imply that a real conflict between the circuits exists because the disagreement reflects a mere inconsistency in dicta regarding the general principle applicable to such cases rather than a conflict on a matter of law or fact that would justify granting a writ of certiorari. In Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985) for instance, the circuit court reversed the district court's denial of the habeas petition but stayed its mandate pending the disposition of the State's petition in this Court. Since the circuit court had not ordered petitioner's unconditional release to start with, it could not even decide "whether Rule 23(b) or Rule 23(c) applies." Id. at 136. In any event, the result of the case turned not nearly so much on the court's construction of Rule 23(c) in dicta as it did on the fact that petitioner had already offered to plead guilty to the very charge for which his conviction was found to be unconstitutional, thus ensuring that he would "remain in prison for at least as long as the Supreme Court takes to act on the state's petition for certiorari..." Id. The court's recognition that the petitioner would remain in

jail regardless of its own action hardly amounts to a true conflict with the Carter holding that questions of dangerousness are more properly a concern of state courts rather than federal habeas courts.

The holding in Lewis v. Henderson, 356 F.2d 105 (6th Cir. 1966) presents even less of a real conflict with Carter. Firstly, it is a 20-year-old pre-Rule 23 opinion that does not even purport to construe the rule of this Court that existed at that time; instead, it considered the motion only under its own local court rule. Id. at 105. Secondly, and even more importantly, that case did not even recognize the presumption of release of a successful habeas petitioner; instead, it relied on an even older case for the proposition that as a matter of policy, "it is by no means clear that as a matter of right and routine a state prisoner should be set at large pending [the State's appeal]." Id. at 106. As such, the Lewis decision clearly has been discredited by more recent cases construing Rule 23(c) and has lost all weight as authority. See Thomas, supra; Cagle v. Davis, supra at 311. In any event, the reason that enlargement was stayed in Lewis, supra at 106, was because defendant faced trial on a separate charge of attempted murder of a police officer. It is disingenuous to argue that reliance on such a factor presents a conflict with the emphasis on a petitioner's readiness to respond to federal process as stressed in Carter.

Finally, petitioner would respectfully remind this Court again that although this case is subject to certiorari jurisdiction, it is nonetheless merely an appeal of an interlocutory order. Cherek v. United States, 767 F.2d 335, 336-337 (7th Cir. 1985). This Court has long held that the

interlocutory nature of an appeal "of itself alone" provides sufficient reason to deny certiorari in all but the most extraordinary matters. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). The petition in the case at bar does not present such a situation; it simply does not present an important question that has been the subject of conflicting circuit court opinions. More to the point, as noted previously, the ruling that petitioners are seeking from this Court would not even change the result on the very motion that forms the basis for their petition. Furthermore, as of July 24, 1986, the appeal on the merits of the district court's order granting the writ of habeas corpus had been fully briefed by both sides, and the case will apparently be submitted to the Third Circuit on October 27, 1986 -- perhaps even before this Court disposes of this petition. If the granting of the writ is affirmed, then petitioners will be free to attempt to raise the instant issue pursuant to Rule 41 of this Court when the Third Circuit enters a final judgment. Thus, no valid reason exists to warrant this Court's consideration of the isues raised in the petition for certiorari at this time or any time in the foreseeable future.

CONCLUSION

For these reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

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Of Counsel and On the Brief

Dated: September 8, 1986

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Did the Third Circuit incorrectly state that its decision in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986) was in conflict with those of other circuits?

2. Is it proper to hear this case on an interlocutory basis when any other procedure would be meaningless?

3. Is the refusal to consider an argument akin to a rejection of that argument on the merits?

4. Do the facts in this case require that a stay be granted?

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STATEMENT OF THE CASE

Petitioners rely on the statement of the case contained in their petition for *certiorari* with the following correction. Respondent was convicted of sexual assault under N.J. Stat. Ann. 2C:14-2c (West 1982).

REASONS FOR GRANTING THE WRIT

A Review of the Arguments Made By Respondent Demonstrates That The Writ Should Be Granted

In the petition for *certiorari* petitioners argued that the Third Circuit Court of Appeals had erred when it ruled in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986) that a federal court which is considering whether to order the immediate release of a state prisoner pursuant to 28 *U.S.C.* sec. 2254 may not even consider such factors as the prisoner's dangerousness to the community or the likelihood that the opposing party will prevail on appeal. We further argued that we were harmed by the district court's reliance on the *Carter* opinion. In opposition to this petition respondent argues that (1) the *Carter* opinion is not really in conflict with the opinions of other circuits; (2) the petition should be rejected solely because it was brought on an interlocutory basis; (3) the orders of the lower federal courts in this case turned on the particular facts of this case rather than the *Carter* opinion; and (4) the petitioners have not provided "serious argument" that respondent's release should be stayed pending appeal. In response to these arguments petitioners assert that (1) it is difficult to imagine a case in which a conflict between the circuits is more clear and certain; (2) this type of argument must be made on an interlocutory basis; (3) the district court in this case specifically relied on the *Carter* ruling rather than the facts of this case; and (4) we are extremely serious in arguing that respondent is a danger

to the community. These arguments will be addressed *seriatum*.

A. There is a Conflict Between the Circuits.

Respondent argues that no "real" conflict exists between the circuits in this case in that the portion of the *Carter* opinion to which we referred was mere *dicta*. (Rb13-12). Petitioners understand that conflicts between the circuits are sometimes exaggerated by those seeking to obtain a writ of *certiorari*. That is not the situation in this case. There can be no better evidence of a split between the circuits than a circuit court's statement that it rejects the rulings of other circuits. In *Carter*, the Third Circuit stated:

> *Some courts have held that more general "bail" standards may be considered by a court in regard to the release of a prevailing habeas petitioner.* See, *e.g. Walberg v. Israel*, 776 F.2d 134, 136 (7th Cir. 1985) (*likelihood of reconviction*); *United States ex rel. Taylor v. Redman*, 500 *F. Supp.* 453, 459 (D.Del. 1980) (*dangerousness*); *Sellars v. Estelle*, 450 *F.Supp.* 1262, 1265 (S.D. Tex. 1978) (*dangerousness*). In addition, one of the only cases attempting to give content to the "special reasons" language of Rule 23(d) considered relevant that a petitioner faced retrial on an additional charge of attempted murder of a police officer. *Lewis v. Henderson*, 356 F.2d 105, 106 (6th Cir. 1966).
>
> Apart from the fact that the term "bail" in the federal habeas context is a misnomer, see *Thomas*, 472 F.2d at 741, *we reject this approach. In the setting of federal habeas review, such factors are simply not relevant.* [781 F.2d at 997 n.5] (emphasis added.)

This footnote refers to the main issue presented to the *Carter* court and the main issue reached by that court.

Neither the Third Circuit in *Carter* nor the other circuits involved felt that these rulings involved *dicta*. Clearly, the *Carter* court felt that it was creating a conflict between the circuits and the rulings of the other circuits support this conclusion. (See Pb11 to 13).

B. This Court Should Grant *Certiorari* Even Though The Merits of the Underlying Appeal are Still Pending Before the Court of Appeals.

Respondent contends that this Court should deny this writ on the basis that the petition was brought on an interlocutory basis. If this argument was to be accepted this issue would never be determined by this Court in a meaningful case.

The relief requested before the district court and the Third Circuit was that respondent remain incarcerated pending appeal of the order requiring his release. Such a motion must of course be made prior to a determination of the merits of the appeal. Similarly, a denial of such a motion must be appealed on an interlocutory basis. If petitioners in this and similar cases await a final determination of the merits of the case in the Court of Appeals, the very purpose of this portion of the appeal—to incarcerate certain successful habeas corpus litigants pending appeal—would be rendered nugatory. This respondent and all similarly situated habeas corpus litigants would remain at liberty pending the final outcome of the appeals.

Petitioners therefore respectfully suggest that an order of a Court of Appeals denying a stay of release on federal habeas corpus grounds should be treated as final. This would be in conformity with this Court's rulings concerning the finality of orders denying bail. In *Stack v. Boyle*, 342 U.S. 1 (1951), petitioners not only argued that the federal district court which heard their motion for reduction of bail had abused its discretion to set bail within a zone of reasonableness but also contended that the bail which was set violated federal statutory and constitutional

standards. This Court ruled that since the district court did not have discretion to refuse to reduce excessive bail, the order of the district court was appealable as a final decision. *Id.* at 6. In *Flanagan v. United States*, 465 U.S 259, 104 S. Ct. 1051, 1055 (1984), this Court, expounding upon the *Stack* decision, stated that an order denying bail may be reviewed as a final judgment since "[t]he issue is finally resolved and is independent of the issues to be tried, and the order becomes moot if review awaits conviction and sentence." *Id.* In this case, the lower federal courts have not merely abused their discretion. Rather, we argue, they have refused to apply federal law in making their determination. Moreover, this issue has been fully litigated and respondent's dangerousness is independent of the issues raised on the merits of the appeal. Thus, the determination should be treated as final.

Even if this is not considered to be a final appeal and even if this case becomes moot by virtue of a future decision of the Court of Appeals, *certiorari* should be granted because this is a significant issue which is "capable of repetition" but will evade review. *Roe v. Wade*, 410 U.S. 113, 125 (1973). As noted above, an appeal of this type must be brought on an interlocutory basis if it is to have any meaningful purpose. Still, in almost all cases of this type (as in this case), the Court of Appeals will have the opportunity to render a decision on the merits prior to the time by which this Court could issue a full opinion on the legal standards which should have been applied. Thus, if full review is denied on the basis that this petition is brought on an interlocutory basis or on the ground that this case may become moot by virtue of a decision on the merits by the Court of Appeals, the important legal question which this case raises will go unanswered in this and all future cases. The erroneous standard set by the Third Circuit will continue to be followed by the lower courts in the circuit, and the people in the states encompassed by the Third Circuit will continually face the risk that dan-

gerous criminals will be released based on legal determinations which may well be overturned by the Court of Appeals. This must not be permitted.

C. The District Court Did Not Consider or Reject Our Arguments Concerning Our Chances Of Success On Appeal And Respondent's Dangerousness.

Respondent appears to agree that the State was given no opportunity whatsoever to press any claim concerning our chances of success on appeal while arguing before the district court for a stay of respondent's release. (Rb5 to 6).[1] Indeed, it would be impossible to argue to the contrary. (See Appendix B at 7a-4 to 11; Pa 13a-22 to 32). Respondent instead argues that if we had been given the opportunity to present this argument in the district court we would not have prevailed. We respond to this contention in subpoint D below. It should be noted, however, that respondent's argument in this regard ignores the purpose of the instant petition. We seek review in this Court not because the lower courts have made a factual error (in fact, they never made a factual determination), but rather because due to an error in interpreting federal law they have refused to allow us to present our factual contentions.

This error was caused by reliance on Third Circuit authority in *Carter*, *supra*, which can be reversed only by an *en banc* ruling of the Third Circuit (See Internal Op-

---

[1] Respondent also contends that this case turned on its particular facts rather than on the law set forth in the *Carter* opinion. This argument is totally implausible. As noted in this subpoint the district court refused to even consider the issues which we presented because the *Carter* opinion did not allow it to do so. Respondent also contends that the Third Circuit rejected our factual contentions. We moved before the Third Circuit *en banc* for a stay. In this motion we requested that they first reconsider the *Carter* opinion and if the *Carter* opinion was rejected *en banc* that they consider our factual arguments. The court refused any reconsideration whatsoever. This cannot possibly be construed as a decision based on the facts of this case.

erating Procedures of the United States Court of Appeals of the Third Circuit 8.C.) or by a ruling of this Court. We requested that the Third Circuit reconsider *en banc* the ruling in *Carter*. The motion was denied. The present petition, therefore, is the only means available by which we may litigate the district court's refusal to even consider our arguments.

Respondent also argues that we were given a full and fair opportunity to argue the issue of dangerousness. This argument is strained. The transcript of the hearing indicates that the State repeatedly attempted to argue dangerousness and that the court repeatedly refused to consider this issue. The only issue the court considered was the possibility of flight. (Appendix B at 7a-14 to 15; 8a-30 to 9a-10; 9a-14 to 17; 13a-6 to 13). The opportunity to present an issue which the court feels it cannot consider and which the court does not consider can hardly be denominated "a full and fair opportunity to substantiate" a claim. (Rb4-12 to 13).

D. The Facts in this Case Require that a Stay be Granted.

Respondent's claims that petitioners' argument exists in a vacuum (Rb3) and that we are reluctant to discuss the record set forth in our appendix (Rb4) are incorrect. As noted in Subpoint C above, we were not allowed to make any argument concerning our chances of success on appeal and were allowed to make only limited argument concerning dangerousness. Rather than presenting arguments to this Court which we were precluded from making in the district court and rather than asking this Court to act as a court of errors which reviews factual disputes, we asked this Court to review an important federal issue. However, since respondent has made prolonged factual arguments which are incomplete, we must respond.

First, contrary to respondent's contentions and as noted in our brief to the Third Circuit, subsequent to committing

the present offense respondent was convicted of the crimes of burglary and theft. Thus, the present crime is not the only serious crime of which respondent has been convicted. Moreover, the evidence in the present case demonstrated that respondent attacked a 69 year-old woman in her apartment building, grabbed her by the throat and threw her to the floor while she pleaded with him to just take her money. Respondent placed a knife to the victim's throat. When she struggled to avoid having her throat slit she was cut on both hands. Respondent then forced the victim to perform fellatio. We believe that these facts in conjunction with respondent's record demonstrate respondent's dangerousness. At the very least they are factors which should have been considered by the federal courts.

With respect to our chances of success on appeal, it should be remembered that the New Jersey Superior Court, Appellate Division, agreed with the district court that the trial judge may well have committed error in not allowing respondent to present an alibi witness. That court ruled, however, that under the facts of this case any such error was harmless. This is precisely the argument which we have presented in our pending appeal.

The state court found that the properly introduced evidence led "overwhelmingly and inexorably to the conclusion of defendant's guilt." (Third Circuit Motion Appendix Ra 99). This evidence included the fact that two unrelated eyewitnesses made unhesitating and clear identifications of respondent. The victim gave a description of respondent which was corroborated by the eyewitnesses and identified respondent in court. Most importantly, respondent himself admitted on cross-examination that he was in the immediate vicinity of the scene of the crime within one-half hour of the time when the crime occurred. (Third Circuit Motion Appendix Ra 101 to 102). Based on these facts, the chances that the Third Circuit will reach the same result as the New Jersey court are great.

Respondent's apparent argument that the petition should be denied if this Court does not believe that petitioners would prevail on the facts inverts the issues. If the Third Circuit was correct in *Carter*, this Court should not reach the underlying factual allegations since they would not be cognizable. Thus before determining whether our arguments are factually correct this Court must determine whether they are legally relevant. Any other course would require this Court to make case by case factual determinations of factors before determining whether these factors should be considered.

E. Rule 23 Sets Forth a Rebuttable Presumption of Release.

In attempting to argue that the *Carter* decision correctly construes *Fed. R. App. P.* 23, respondent misconstrues many of our arguments.

Respondent states that petitioners opine that *Fed. R. App. P.* 23(b),(c) and (d) should be read in conjunction "simply because all three rules use the word 'enlargement.'" (Rb11-26 to 27). Obviously, we have not made any such argument. Rather, we have argued that these three sections of Rule 23 deal with the possible resolutions of a petition for habeas corpus and set forth interrelated presumptions concerning release from confinement based on those resolutions. As such we simply argue that the various subsections should be read in a vacuum.

Respondent also asserts that we merely pay lip service to the presumption in favor of releasing a successful habeas corpus litigant. This is a "straw-man" argument and totally misstates our position. We fully agree that there is and should be a presumption in favor of releasing a successful habeas litigant. We also feel, however, that reasonable rules have been adopted which make it possible to overcome that presumption in limited circumstances.

In a related vein, respondent argues that since dangerousness can be considered if it relates to a habeas

petitioner's ability to respond to process or in some other way relates to a federal issue (see *Carter v. Rafferty, supra* at 996-997), the community is protected. Obviously a person who is dangerous to the community may well be able to respond to federal process and no other federal concern under *Carter* may be susceptible of proof. Thus, under the *Carter* opinion a dangerous person will almost always be released. It should also be remembered that respondent's argument in this regard totally ignores the strong possibility that we may be successful on appeal.

In sum, petitioners have attempted to set forth a reasonable position which accepts the presumption that a successful habeas corpus litigant should be released absent a showing that factors exist which overcome this presumption. This position is in accordance with the previously prevailing custom in the jurisdiction (see *Morrison v. Kimmelman*, 752 F. 2d 918, 920 (3rd Cir. 1985), aff'd on other grounds, ___ U.S. ___, 106 S.Ct. 2574 (1986)) and fully comports with the applicable rules.

CONCLUSION

Based on all of the briefs in this case, petitioners believe that this case involves an important federal issue concerning which the circuits are in conflict. This Court has not heretofore resolved this issue. It is also clear that, although petitioners are primarily concerned with the broad legal principle which this case involves, based on the facts of this case respondent does present a danger to the community and our chances of success on appeal are great. Moreover, issues of this type must by their nature be raised on an interlocutory basis or not at all. Therefore, we respectfully request that this Court grant the petition, rule that dangerousness and the State's chances of success on appeal are factors which should be considered and either remand for a hearing at which these facts are considered by the lower courts or resolve these issues in our favor

and grant the stay based on the facts which are here presented.

Respectfully submitted,

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No. 86-108

IN THE

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OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 24, 1986
PETITION FOR CERTIORARI GRANTED OCTOBER 14, 1986

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July 29, 1980—Essex County Indictment No. 3119-79 filed in the matter of *State v. Dana Braunskill.*

January 26, 27, 28, 29 and 30, 1981—Trial held and verdict of guilty returned in *State v. Dana Braunskill.*

March 26, 1981—Motion for a new trial heard and denied in *State v. Dana Braunskill.* Sentence imposed and judgment of conviction entered in *State v. Dana Braunskill.*

Superior Court of New Jersey, Appellate Division

May 11, 1981—Notice of Appeal filed in *State v. Dana Braunskill.*

December 14, 1982—Affirmance of conviction in *State v. Dana Braunskill.*

Supreme Court of New Jersey

March 1, 1983—Certification denied in *State v. Dana Braunskill.*

United States District Court for the District of New Jersey

April 26, 1985—Petition for *habeas corpus* filed in *Dana Braunskill v. Gary Hilton, et al.*

May 28, 1985—Answer to petition filed in *Dana Braunskill v. Gary Hilton, et al.*

February 27, 1986—Petition for *habeas corpus* granted in *Dana Braunskill v. Gary Hilton, et al.*

March 26, 1986—Motion for stay of order granting *habeas corpus* pending appeal heard and denied.

United States Court of Appeals for the Third Circuit

March 20, 1986—Notice of Appeal filed in *Dana Braunskill v. Gary Hilton, et al.*

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Supreme Court of United States

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 85-2008

DANA BRAUNSKILL,

Petitioner,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and IRWIN I. KIMMELMAN, Attorney General of New Jersey.,

Respondents.

ORDER

For the reasons set forth in this court's opinion filed this date;

It is on this 27th day of February, 1986;

ORDERED that the petition for writ of habeas corpus is hereby granted; and

IT IS FURTHER ORDERED that the state has a reasonable time in which to retry petitioner and that a writ of habeas corpus shall unless within 30 days the State of New Jersey shall afford petitioner a new trial.

/s/HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
U.S.D.J.

Hon. Harold A. Ackerman, U.S.D.J.

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TRENTON, NEW JERSEY 08625
(609) 292-9086

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER:

CIVIL ACTION

NOTICE OF APPEAL

Notice is hereby given that W. Carey Edwards, Attorney General of the State of New Jersey, et al., respondents

above, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order that a Writ of Habeas Corpus shall issue in this action 30 days from such Order which was entered on the 27th day of February, 1986.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Movant-Appellant

BY: /s/RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 20, 1986

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

PLEASE TAKE NOTICE that the undersigned will move, on short notice, before the Honorable Harold A. Ackerman, U.S.D.J., in the United States Courthouse Newark, New Jersey, on the 26th day of March, 1986 at 3:30 p.m. or as soon thereafter as counsel can be heard, for an Order: staying entry of the Order of February 27, 1986 that a Writ of Habeas Corpus shall issue 30 days from that date, pending determination of this matter by the United States Court of Appeals for the Third Circuit. Reliance will be placed on the accompanying affidavit in support of this motion.

BEST AVAILABLE COPY

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANT

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 21, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 85-2008
TRANSCRIPT OF PROCEEDINGS

DANA BRAUNSKILL,

Plaintiff,

vs.

GARY HILTON, Warden of the State of New Jersey,

Defendant.

Newark, New Jersey
March 26, 1986

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

JOHN F. MC MAHON, Federal Public Defender,
BY: JACQUELINE TURNER,
Assistant Federal Public Defender,
For the Plaintiff.

W. CARY EDWARDS, Attorney General of New Jersey
BY: RAYMOND S. GURAK,
Deputy Attorney General of New Jersey
For the Defendant.

[Tr. p. 2]

THE COURT: May I have the appearances, please?

MR. GURAK: Raymond S. Gurak, Deputy Attorney General for New Jersey.

MS. TURNER: Jacqueline Turner, Assistant Federal Public Defender, for defendant David Rothstein.

THE COURT: Mr. Gurak, you're here today for what?

MR. GURAK: To seek a motion for a stay of your order for enlargement of petitioner Dana Braunskill.

THE COURT: On what ground?

MR GURAK: That's the question, your Honor.

THE COURT: That's the question I'm asking.

MR. GURAK: And the answer is for the special phases of likelihood of success on the merits.

THE COURT: That's not a reason.

MR. GURAK: It's not a reason. It is not a cognizable reason under Carter.

THE COURT: No. Under Carter the only reason is the possibly of flight.

MR. GURAK: The possibility of flight would be substantiated in this case also, your Honor.

THE COURT: Well, substantiate it.

MR. GURAK: Because this petitioner has a long prior record. And we feel that it is quite likely that he would ???? the jurisdiction given his less than though prior record and he would be cognizant of the fact that if our appeal was successful [Tr. p. 3] he would be compelled to serve the remainder of his term as well.

Your Honor looks perplexed.

THE COURT: I'm asking for some substantiation of that. Certainly there was nothing in your papers to even remotely indicate that.

MR. GURAK: Well, my papers, your Honor, cited the cases that dealt with the four factors that could possibly

be used to substantiate special reasons for staying an enlargement order.

THE COURT: Have you read the Court of Appeals recent decision in the Carter case?

MR. GURAK: Yes, I have. It is our office's position that notwithstanding that opinion—

THE COURT: Notwithstanding that opinion?

MR. GURAK: Yes.

THE COURT: What do you mean, "notwithstanding"? You mean I should ignore that opinion?

MR. GURAK: No, no. We feel that that opinion dealt with a specific factual instance wherein the State attempted to argue that stay would be granted in that case on the ground of dangerousness. And we feel that the Court in that decision did not preclude other factors from substantiating the special reason sufficient to grant the stay.

THE COURT: Show me where in that opinion that can be [Tr. p. 4] found.

MR. GURAK: I will attempt to do so. I have a Xerox copy. And I don't have page numbers on it, but under Subsection (b) of the opinion, on the right-hand side of the page just above Roman Numeral 2, there is one full paragraph. And it says, quote, It is rather that we must interpret Rule 23(d) to be consistent with federalism and comity concerned and these concerns dictate that at least in this case. The special reason presented; i.e., dangerness, is one that is particularly within the authority of the State to recognize and act upon.

THE COURT: May I read what Judge Garth said to us, which I think is more pertinent on behalf of the Third Circuit.

"Our holding that a federal court in viewing the release of a State habeas primmer who has prevailed on his con-

stitutional claim should consider only those factors which bear on guaranteeing the future presence of the petitioner does not leave the statement without recourse."

Now, the State in that case, as I read it, was told by the Court of Appeals that if it considered, as it did, Mr. Carter to be dangerous, it could go to the state courts.

I, of course, am empowered to enlarge the time if I find that there is some doubt as to Mr. Braunskill's future presence. The only point I wanted to make to you at this time is in your papers there was no indication whatsoever as to that ground. Is that correct? [Tr. p. 5]

MR. GURAK: As to the ground of dangerousness?

THE COURT: As to the ground that he might not be around if there was a reversal by the Third Circuit.

MR. GURAK: Right. That's true. There was no factual argument in our papers. We solely cited the case law dealing with the four factors and you have that.

THE COURT: How many more years does he have to go or have to serve, to be more precise?

MR. GURAK: He has approximately about four years to go. But he is scheduled for a parole date hearing in August.

THE COURT: In August?

MR. GURAK: In August, yes.

THE COURT: Now, you say that you feel that the fact that he has this time to serve and he has a lengthy criminal record—would you enlarge upon that theme? Tell me about his record.

MR. GURAK: I would have to refer to my papers.

THE COURT: You go right ahead, sir.

MR. GURAK: I will review this briefly; his adult history.

THE COURT: Go right ahead, sir.

MR. GURAK: In 1979 received a DP for invading privacy as a peeping Tom.

THE COURT: "DP" is disorderly persons?

MR. GURAK: That's correct.

THE COURT: As a peeping Tom?

MR. GURAK: Peeping Tom. [Tr. p. 6]

THE COURT: What was the sentence imposed by the Court and what was that Court, if I may?

MR. GURAK: That was a 90-day sentence to the Essex County Jail. Well, that's his prior adult record.

THE COURT: You consider that a lengthy criminal record?

MR. GURAK: Well, he has a lengthy juvenile record as well. And juvenile records can be considered to some extent in deciding whether or not a particular defendant may or may not flee a jurisdiction.

THE COURT: How old is this gentleman?

MS. TURNER: I'm not sure. I believe he's around 30. Late 20s, early 30s.

THE COURT: May I assume whatever record he amassed—I'll question you about it in a moment—was approximately at least 16 years ago? Would that be a fair assumption on this Court's part?

MR. GURAK: That would be, your Honor.

THE COURT: You want to tell me about his juvenile record now that we have carefully examined his adult record and found a 90-day sentence for being a peeping Tom, which is hardly a lengthy criminal regard by any reasonable standard.

MR. GURAK: I will admit to that, your Honor.

In 1976 he was charged with robbery. [Tr. p. 7]

THE COURT: He was charged with robbery?

MR. GURAK: Charged with robbery. There was a remand to Overbrook Hospital for examination.

THE COURT: To what?

MR. GURAK: Overbrook Hospital.

THE COURT: That's a psychiatric hospital?

MR. GURAK: Yes, it is.

THE COURT: What happened to that case?

MR. GURAK: As I look at it now, that was dismissed as well.

THE COURT: What else?

MR. GURAK: I'm still hunting, your Honor.

The others just—there was two with fines and others were dismissed as well.

THE COURT: Mr. Gurak, what lengthy criminal record does this man have?

MR. GURAK: I would have to say I was in error by making that statement, your Honor. I did look at that prementence report rather quickly without—and I apologize to the Court for that.

At this point in time I feel that the only thing the State would be able to argue would be that the facts of this particular case substantiate that this particular petitioner has at this time committed a very serious crime. On that [Tr. p. 8] basis, his dangerousness is established and we fell he has made a substantial move from his minor prior record to that of a serious offender in the state of New Jersey. And on that basis we feel that there is a reasonable

likelihood that he would not show up for the case he would have to in the future proceeding.

THE COURT: What is your name?

MS. TURNER: Jacqueline Turner, your Honor.

THE COURT: Good morning.

MS. TURNER: Basically, your Honor, what we have here is a defendant who has been held on an unconstitutional conviction for the last five years.

There's a—the question is: Did Mr. Braunskill attack this woman? That has always been the question central you. And your Honor ruled the conviction of what he was doing that is affirmed.

As Mr. Gurak admits, there's really no prior record. DP quite a while ago. Ninety days in jail. Mr. Braunskill was admitted on bail pretrial. He should showed up for his trial.

The allegation he would flee after having a few months left to spend in jail at worst has not been substantiated by the State. I remind the Court it's a heavy burden on the State to stop you from enlarging Mr. Braunskill. I maintain they have not met, your Honor. Your opinion was thorough. It was based on ample precedent. It was a narrow issue. Was very likely to be upheld in the Third Circuit on appeal. [Tr. p. 9]

There is no clear evidence of future dangerousness and/or likelihood of flight. He appeared during pretrial and during the trial at all times. Given the fact the burden is a heavy one on the State, I would ask your Honor that the stay be denied.

THE COURT: I'm going to deny the stay. I have not been furnished with any reasons whatsoever as to why this Court should enlarge its order related to Mr. Braunskill.

The State this morning, in response to the Court's questions, cited a lengthy criminal record. As the record clearly reflects, I questioned the Deputy Attorney General concerning this matter and that assertion was just erronous as the Deputy Attorney General now admits.

The Deputy Attorney General further argues that Mr. Braunskill is dangerous. For reasons which were amply set forth by the Court of Appeals very recently in the matter of Carter and Artis versus Rafferty, this is a matter that the State can bring to the attention of the state courts if it cares to. And I need not dwell on that theme, since Judge Garth, speaking for the Court of Appeals, did so.

Originally, as the Court noted, under the prior rule release was mandatory. Now, there are—the rule has been amended and I find no special reason here citing to the rule which would reasonably allow me to conclude that Mr. Braunskill is not going to show up in case my decision is overturned. [Tr. p. 10] Therefore, the relief sought today by the State is denied.

Yes, Mr. Gurak.

MR. GURAK: Your Honor, if I may respectfully ask, with regard to the first part of my presentation, about the interpretation of Carter as to what would constitute a special reason, respondent still submits, your Honor, that likelihood of success on the merits would be cognizable as a special reason. And on that basis, your Honor, I would respectfully request a conditional stay be granted so that we may file our papers by four o'clock tomorrow afternoon in the Third Circuit on this matter.

THE COURT: Wait a second. Today is the 26th of March.

Now, my order, which was issued on the 27th day of February, stated: "Ordered that petition for writ of habeas corpus is hereby granted and further ordered that the

State has a reasonable time in which to retry petitioner that a writ of habeas corpus shall issue unless within 30 days the state of New Jersey shall afford petitioner a new trial."

I'm denying you the relief you seek today for a stay. If you want to go to the Court of Appeals to seek further relief in that regard, that's the State's prerogative.

MR. GURAK: Thank you, your Honor.

THE COURT: You're quite welcome. Good morning.

MR. TURNER: Thank you, your Honor.

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey
Movant-Appellants.

FILED
MAR 26, 1986

CRIMINAL ACTION

ORDER

It is on this 26th day of March, 1986 that movant-appellants' motion for a stay of the Order that a Writ of

Habeas Corpus shall issue, 30 days from February 27, 1986, is denied.

/s/ HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS
BY: RAYMOND S. GURAK
DEPUTY ATTORNEY GENERAL
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 86-5204

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

CIVIL ACTION
MOTION IN BANC
(for a stay of order)

PLEASE TAKE NOTICE that the undersigned, will move *en banc* on an expedited basis, before the United States Court of Appeals for the Third Circuit for an Order: staying entry of the order of February 27, 1986, that a Writ of Habeas Corpus releasing petitioner shall issue 30

days from that date, pending determination of the direct appeal of this matter by this Court. This motion is not moot since petitioner is otherwise incarcerated for another conviction until May 20, 1986. Reliance will be placed on the accompanying brief and appendix in support of this motion *en banc*.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: May 16, 1986

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

May 16, 1986

DANA BRAUNSKILL
vs.

GARY HILTON, WARDEN AND STATE OF NEW JERSEY
W. CARY EDWARDS, Attorney General of the State of New Jersey, *et al.*,

Appellants

(N.J. D.C. Civil 85-2008)

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges.*

1. Appellants' motion in banc for a stay of the District Court's order dated February 27, 1986, pending appeal *and* Brief and Appendix in support of motion, *and* letter dated May 16, 1986, in which it states that appellee is scheduled to be released on parole from state custody on another conviction on the morning of May 20, 1986,

in the above-entitled case(s).

Respectfully,

Deputy Clerk 7-1092

enc.
dt
P.S. Appellants' brief and appendix are due June 21, 1986.
The foregoing Motion is DENIED.

By the Court,

/s/ ALDISERT
ALDISERT
JA 493 Chief Judge

Dated: May 27, 1986
ad/cc: Raymond S. Gurak, Esq.
Jacqueline E. Turner, Esq.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 14, 1986

Mr. Allan J. Nodes
Deputy Atty. General
Hughes Justice Complex
Trenton, NJ 08625

Re: Gary Hilton, Superintendent, New Jersey State Prison, et al.,
v. Dana Braunskill
No. 86-108

Dear Mr. Nodes:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

Very truly yours,

/s/ JOSEPH F. SPANIOL, JR.,
JOSEPH F. SPANIOL, JR., Clerk

No. 86-108

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF PETITIONERS ON THE MERITS

W. CARY EDWARDS
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Richard J. Hughes Justice Complex
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ALLAN J. NODES
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RAYMOND S. GURAK
Deputy Attorneys General
Division of Criminal Justice

Of Counsel & On the Brief

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Are federal courts absolutely barred from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting the writ will be reversed on appeal in deciding whether to stay release on habeas corpus pending appeal?

Is an interpretation of *Fed. R. App. P.* 23(c) which effectively extinguishes the State's right to appeal consistent with the comity concerns underlying this Court's opinions and the federal statutes concerning habeas corpus?

Does the Constitution require the immediate release of a successful habeas corpus petitioner notwithstanding the pendency of the State's appeal of the granting of the writ?

Whether the questions presented by petitioners to this Court should be considered moot although this case involves an issue that is "capable of repetition, yet evading review"?

PARTIES BELOW

All parties below are parties to this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-108

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey,
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

**On Writ of Certiorari To The
United States Court of Appeals
For The Third Circuit**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of New Jersey, issued without a written opinion, is reproduced at JA-17 to 18.

The district court's stated reasons for denying the order are reproduced at JA-8 to 16.

The order of the United States Court of Appeals for the Third Circuit, which has not been published, and was

issued without written opinion, is reproduced at JA-21 to 22.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 2254, respondent petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey. Pursuant to 28 U.S.C. sec. 2243, the United States District Court for the District of New Jersey issued an order granting a writ of habeas corpus on February 27, 1986.

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. sec. 2253 on March 20, 1986. On May 16, 1986, petitioners moved for a stay of respondent's release under *Fed. R. App. P.* 8(a) and 23(b), (c) and (d). This motion was denied on May 27, 1986. No petition for rehearing was sought.

This petition was filed within sixty (60) days of that date pursuant to Rule 20.1 and 20.4, Rules of the Supreme Court. The jurisdiction of this Court to review the order of the Third Circuit denying petitioners' motion for a stay is invoked under 28 U.S.C. sec. 2254(a), with *certiorari* to the United States Court of Appeals for the Third Circuit having been granted on October 14, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED
AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATUTES INVOLVED

United States Code, Title 18. Section 3141:

(a) Pending trial. A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be

released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending sentence or appeal. A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

United States Code, Title 18, Section 3142:

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(e) Detention. If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

United States Code, Title 18, Section 3143:

(b) Release or detention pending appeal by the defendant. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and

who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds--

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

(c) Release or detention pending appeal by the government. The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

United States Code, Title 28, Section 2101:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

United States Code, Title 28, Section 2107:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

United States Code, Title 28, Section 2243:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

. . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

United States Code, Title 28, Section 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUPREME COURT RULES

Rule 41. Custody of prisoners in habeas corpus proceedings

2. Pending such review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may

be enlarged upon his recognizance, with or without surety, as may appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

3. Pending such review of a decision ordering release, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court, Justice, or judge rendering the decision, or the court of appeals or this Court, or a judge or Justice of either court, shall otherwise order.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order shall be modified or an independent order respecting custody, enlargement, or surety shall be made.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or Injunction Pending Appeal

(a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.

Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is

not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

RULES INVOLVED

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release

a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceedings, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

THIRD CIRCUIT COURT OF APPEALS INTERNAL OPERATING PROCEDURES
10P CHAPTER 5. OPINIONS

* * *

3. Time schedule for panel drafting and circulating opinions.

a. 60-day period for drafting opinion writing. The Administrative Office of the United States

Courts, pursuant to a resolution of the Judicial Conference of the United States, requires notification by the Clerk of all cases which have not been terminated within a prescribed time. The presiding judge of the panel is required to give an explanation for the delay. In order to effectuate this policy, the opinion-writing judge is expected to circulate a draft of his opinion within sixty (60) days after assignment.

b. 45-day period to file concurring or dissenting opinion. When one of the other two panel judges approves the draft opinion it becomes the proposed majority opinion. If the third judge desires to circulate a concurring or dissenting opinion, he is given forty-five (45) days to do so or to state that he wishes to be recorded as concurring or dissenting in the result. See also Section D.

STATEMENT OF THE CASE

Respondent was indicted on July 29, 1980, on charges of aggravated sexual assault in violation of N.J. Stat. Ann. 2C:14-2 (West 1982) and the unlawful possession of a knife in violation of N.J. Stat. Ann. 2C:39-5(d) (West 1982). He was tried before the New Jersey Superior Court, Law Division, on January 26 through January 30, 1981, and found guilty on both charges. On March 26, 1981, he was sentenced to an aggregate term of eight years in the New Jersey State Prison with a four-year parole ineligibility term. His convictions were affirmed by the New Jersey Superior Court, Appellate Division on December 14, 1982. His petition for certification was denied by the New Jersey Supreme Court on March 1, 1983.

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey on April 26, 1985. On February 27, 1986, the Hon-

orable Harold A. Ackerman, U.S.D.J., ordered that a writ of habeas corpus should be issued 30 days from that date. (JA-3). The basis of this writ was Judge Ackerman's ruling that the state courts had violated respondent's sixth amendment right to call witnesses in his defense by enforcing *New Jersey Court Rule* 3:11-1, which requires that defendants, upon request, inform the State of the identity of any alibi witnesses which they intend to present at trial. The court further ruled that failure to allow the alibi witness to testify did not constitute harmless error.

Petitioners filed a Notice of Appeal from this order on March 20, 1986. (JA-4 to 5). On March 26, 1986, petitioners moved for a stay of respondent's release on habeas corpus before the district court. (JA-6 to 7). Judge Ackerman denied this stay on the basis of the decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986). The district court noted that under the *Carter* opinion, it could not consider either respondent's dangerousness or the likelihood that the order granting the writ would be reversed on appeal in deciding whether to stay issuance of a writ of habeas corpus pending appeal. (JA-8 to 16, Tr 3-7 to 4-25; Tr 9-6 to 25; JA-17 to 18).

On May 16, 1986, petitioners moved before the United States Court of Appeals for the Third Circuit for a stay of the district court writ which ordered that respondent be released. (JA-19 to 20). This motion was denied on May 27, 1986. (JA-21 to 22).

This Court granted *certiorari* on October 14, 1986. (JA-23).

SUMMARY OF ARGUMENT

1. The courts below, relying on *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986), incorrectly construed *Fed. R. App. P.* 23(c) to bar consideration of a habeas petitioner's dangerousness and the chances of success of a state's appeal

in denying the state's request for a stay of respondent's release pending appeal. This construction of Rule 23(c) totally misreads the plain language of the rule and its history, which readily suggest that federal judges have broad discretion to evaluate various considerations—including dangerousness and chances of success on appeal—when deciding whether or not to immediately release a habeas petitioner. This Court's opinions, recognizing the important state interests underlying habeas corpus jurisprudence, further dictate that federal courts take account of vital state interests before releasing a habeas petitioner during the pendency of a state's appeal. Moreover, the Third Circuit's narrow reading of Rule 23(c) conflicts with common practice in the other federal circuits, where courts examine a wide range of state concerns in deciding whether to stay a habeas order releasing the petitioner pending the results of the state's appeal.

2. The opinion in *Carter v. Rafferty* erroneously suggests that upon a district court's decision granting a writ of habeas corpus, the successful petitioner is constitutionally entitled to be released from custody. Neither the historical underpinnings of habeas corpus nor concepts of due process mandate that the successful habeas petitioner be automatically released during the pendency of an appeal from the finding of a federal district court that the petitioner's adjudication of guilt was constitutionally invalid. Because of the unique procedural posture of the grant of a habeas writ at the district court level, keeping the petitioner in custody pending appeal is a valid continuation of punishment under due process principles. Alternatively, decisions of this Court suggest that continued detention of a habeas petitioner pending appeal does not constitute punishment and for this reason does not violate due process. Decisions of this Court also support the use of the habeas petitioner's dangerousness to the community as a valid consideration in the determination of whether to stay his release.

3. There is no doubt that the issue presented in this case is not moot at this time. Even if this case should become moot at a later date because of a decision on the merits of the underlying appeal by the Third Circuit Court of Appeals, the issue presented should be decided in this case. Because this issue must be submitted to this Court in the course of an ongoing appeal, it is clear that any appeal of this type may become moot pending resolution by this Court. This case presents an issue of extreme public importance which is "capable of repetition, yet evading review"; therefore, review by this Court continues to be warranted.

LEGAL ARGUMENT

POINT I. FEDERAL COURTS HAVE BROAD DISCRETION UNDER *FED. R. APP. P.* 23(c) TO CONSIDER NUMEROUS STATE INTERESTS IN DECIDING WHETHER TO STAY A HABEAS PETITIONER'S RELEASE PENDING APPEAL BY THE STATE.

Nowhere does the Constitution mandate that a prevailing habeas petitioner must be unconditionally released pending the State's appeal of the habeas order granting the writ. Nor is the automatic release following the issuance of a habeas order required by *Fed. R. App. P.* 23(c). Indeed, the plain language of this rule grants federal courts the discretion to determine the appropriateness of release. Moreover, the history of Rule 23(c) and its predecessor Supreme Court rules firmly demonstrates that dangerousness and the chances of the State's success on appeal of the habeas order should be considered by a federal court in exercising discretion whether to immediately release a prevailing habeas petitioner. This reasoned exercise of discretion is totally consistent with the statutory mandate to dispose of habeas matters as "law and justice require," and it fully recognizes the tension inherent in federal ha-

beas review—deference for the sovereign power of the various states, the need to preserve the state's unbridled right to appeal the issuance of a habeas writ, and federal supervision of the application of federal constitutional law in state court proceedings.

A. *Fed. R. App. P.* 23(c) Allows Federal Courts to Consider a Habeas Petitioner's Dangerousness and the State's Chances of Success on Appeal in Deciding Whether to Release a Successful Habeas Petitioner Pending Appeal by the State.

In refusing to stay respondent's release on federal habeas corpus pending appeal by petitioners, the lower federal courts declined to even consider petitioners' chances of success on appeal or respondent's dangerousness to the community at large These refusals were based on the very recent decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986). Petitioners assert that the standards set forth in that opinion are novel, in conflict with the opinions of other circuits, at odds with the customary practice and interpretation of controlling statutes, impractical and dangerous.

The starting point of the *Carter* opinion is the fact that a successful habeas corpus litigant is presumptively entitled to release under *Fed. R. App. P.* 23(c). *Id.* at 994. Petitioners, of course, would not contest this much of the opinion. Petitioners also agree with the portion of the *Carter* opinion that states that in order to gain release, a successful habeas corpus petitioner must assure the court of his presence at future federal court proceedings. *Id.* at 995. The *Carter* court, noting that it had little guidance save for the sparse wording of Rule 23, nonetheless went on to rule that the federal courts are prohibited from consideration of factors other than those related to flight in determining whether or not to immediately release a federal habeas corpus petitioner.

The *Carter* opinion, which the district court was required to follow, and which the Third Circuit refused to reconsider, is at variance with long-standing practice in the district of New Jersey, is not mandated by section 2254 of Title 28 of the United States Code and is not in consonance with Rule 23.

Rule 23 states in applicable part:

> (b) DETENTION OR RELEASE OF PRISONER PENDING REVIEW OF DECISION FAILING TO RELEASE. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, *as may appear fitting to the court or justice or judge rendering the decision*, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.
>
> (c) RELEASE OF PRISONER PENDING REVIEW OF DECISION ORDERING RELEASE. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, *unless the court or justice or judge rendering the decision*, or the court of appeals or the Supreme Court, or a judge or justice or either court *shall otherwise order*.[1]

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[1] Subsection (d) of the Rule, which deals with modification of an initial order governing custody pending review, provides:

> (d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall

Fed. R. App. P. 23 (emphasis added).

Sections (b) and (c) of Rule 23 each create presumptions that are dependent upon the outcome of the habeas corpus proceeding. Section (b) creates a presumption that if the writ is denied, the prisoner will remain in the same position concerning release as he was prior to the decision on his petition. That is, at the discretion of the court, he will be subject to continued incarceration unless the court feels that enlargement is appropriate under the circumstances. Section (c), on the other hand, creates a presumption that if a prisoner's conviction is found to have been obtained unconstitutionally or illegally, the prisoner will be enlarged pending review of the decision unless a federal court, judge or justice orders otherwise. Thus, it is presumed that a habeas petitioner who has prevailed will be released and that a non-victorious petitioner will remain incarcerated. See *Walberg v. Israel*, 776 F.2d 134, 135-36 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 546 (1985). Nevertheless, at the discretion of the court, these sections permit the enlargement of a non-victorious petitioner and the continued incarceration of a victorious litigant. *Id.* at 136.

Sections (b) and (c) do not provide guidance as to what factors a court may consider in determining whether the presumptions contained in these sections have been overcome. The same interests relating to enlargement pending habeas review and to section (b), however, should also be considered under section (c). In *Iuteri v. Nardoza*, 662 F.2d 159 (2d Cir. 1981), the Court ruled that absent a showing that the habeas petition has raised "substantial claims" which presented a "likelihood of success," enlargement pending review of a denial of habeas corpus was inappropriate. *Id.* at 161. Moreover, the *Iuteri* court considered

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be made.

Id.

the issue of petitioner's dangerousness to the community. *Cf. Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Baker v. Sard*, 420 F.2d 1342, 1343-44 (D.C. Cir. 1969); *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955). Likewise, factors such as the government's chances of success on appeal and the dangerousness of the prisoner should be considerations under section (c).

Congress, in enacting Rule 23, relaxed the standards that formerly appeared to mandate the release of a successful habeas litigant. The Third Circuit recognized this fact in *United States ex rel. Thomas v. New Jersey*, 472 F.2d 735 (3d Cir. 1973), *cert. denied*, 414 U.S. 878 (1973), in which the court noted that in 1886 the United States Supreme Court issued the following order:

> Order, that the following regulations be established under section 765 of the Revised Statutes:
>
> **RULE 34.**
>
> **CUSTODY OF PRISONERS ON HABEAS CORPUS.**
>
> * * * * *
>
> 3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, or special reasons, sureties ought not to be required. 117 U.S. 708.

Thomas, 472 F.2d at 742. The *Thomas* court noted that at that time the present equivalent to Rule 34(3) was Rule 49(3) (now Rule 41(3)) of the Supreme Court Rules. 472 F.2d at 742. The *Thomas* Court then stated:

> When in 1967 the Supreme Court promulgated the Federal Rules of Appellate Procedure, it included in Rule 23 a rule identical in language with its own Rule 49. Thus, Rule 23(c) is the

> direct succession from the original Supreme Court Rule 34(3) adopted in 1886. Even though until 1957 it appeared in the Supreme Court rules, at all times it has dealt with the duty of the district courts in habeas corpus cases. In 1886 the language requiring the enlargement of the successful habeas corpus petitioner was mandatory. The only discretion was in deciding whether a surety on his recognizance ought to be required. The mandatory language with respect to enlargement of the successful petitioner was carried forward until 1967. In that year, however, Rule 49(3) was revised to provide that the successful petitioner "shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order." The revised language was carried into Rule 23(c), Fed.R.App.P.
>
> Thus from 1886 to 1967 a judge granting habeas corpus relief was under a flat mandate to enlarge the petitioner pending appeal. . . . [I]t is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement. *See* E. Bosky and E. Gressman, The 1967 Changes in the Supreme Court's Rules, 42 F.R.D. 139, 161 (1967).

Thomas at 742-73.

Based on this history, respondent's argument that reliance should not be placed on cases decided before the adoption of Rule 23(c) is misdirected. Certainly if it was permissible to take into consideration factors such as dangerousness and the chances of success on appeal under a rule which normally mandated release, it is appropriate to take these factors into consideration under the present rule which is intended to provide more discretion. *See Lewis v. Henderson*, 356 F.2d 105 (6th Cir. 1966); *Walberg v. Israel*, 776 F.2d at 136; *but see Thomas*, 472 F.2d at 743.

The *Thomas* decision, which was followed by the *Carter* court, then stated that the additional discretion was provided merely to enable the federal courts to ensure the petitioner's continued availability. In reaching this conclusion the court first noted that Rule 23(c) no longer contains the express language, contained in Rule 34, which mandated that surety could be required only "for appearance to answer the judgment of the appellate court." The court then found that "no change in substance was intended." *Id.* at 743. Thus, according to the Third Circuit, the change meant nothing.

This holding contradicts the earlier portion of the *Thomas* opinion which holds that the change was intended to provide more discretion than had originally been permitted. It also contradicts the main authority relied on by the court, Bosky and Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139 (1967). Bosky and Gressman explain, "The amendment gives a measure of discretion to continue detention of the prisoner pending appeal *when this seems desirable* despite the ruling in his favor." *Id.* at 161 (emphasis added).

Petitioners suggest that the change was not meaningless and that the rule permits all federal courts to consider factors such as dangerousness, the chances of reversal on appeal, the chances that defendant would be convicted on retrial and the burden that release would place on the

State. *See Clark v. Rose*, 611 F.Supp. 294 (M.D. Tenn. 1984) (considering time necessary for appeal, period of incarceration, and the burden on the state should petitioner be released; refusing to grant release of successful petitioner pending appeal by the state), *aff'd*, 762 F.2d 1006 (6th Cir. 1985), *rev'd on other grounds*, ___ U.S. ___, 106 S. Ct. 3101 (1986); *cf. Tate v. Rose*, 466 U.S. 1301 (O'Connor, Circuit Justice, 1984) (staying order granting release of a successful habeas petitioner pending petition by the state; in reversing the order, Justice O'Connor considered the likelihood of a successful petition, the burden of incarceration, and the burden that release and retrial would impose on the state), *aff'd*, 467 U.S. 1249 (1984) (refusing to vacate stay).

The Third Circuit noted that its opinion in *Carter* conflicted with the prevailing authority. 781 F.2d at 997 n.5. The *Carter* court diverged from the opinions of the other circuits for two reasons. First, these opinions referred to the term "bail," and the *Carter* court found that "the term 'bail' in the federal habeas corpus context is a misnomer." *Id.* Secondly, the Third Circuit found that it had no explicit authority to consider the factors considered by the other circuits due to the fact that it was "provided not with a detailed statutory scheme concerning the disposition of prisoners fully subject to federal authority, but rather a sparsely worded rule . . . ." *Id.* Petitioners suggest that the rule in question entrusts the federal courts with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner. Nevertheless, in this case, the district court has relied on, and the Third Circuit has refused *en banc* reconsideration of, a recent opinion in which the court itself noted it had created a conflict among the circuits, and which was based solely on its reading of a "sparsely worded rule" which has not been interpreted by this Court. In so doing it has imposed an unduly restrictive interpretation on the rule in question.

Section (d) of Rule 23 supports an interpretation of sections (b) and (c) which permits consideration of a wide range of interests.[2] Section (d) specifies that the original order entered under sections (b) and (c) shall govern review unless special reasons for modification of the order are shown to either the court of appeals or the Supreme Court. Again, there is no explanation of what "special reasons" may be considered by the reviewing court. However, common sense would indicate that the reviewing court's analysis of the chances that the lower court order will be reversed on appeal and of the dangerousness of the prisoner would be among these considerations. The *Carter* court's ruling (which was followed by the district court and the circuit court in this case), that the prisoner's continued availability to respond to federal process or issues which relate to some other federal interest are the sole criteria which may be considered, is in conflict with the decisions of two other circuits. In *Walberg v. Israel*, the court found that Rule 23(c) contained a rebuttable presumption that upon a grant of habeas corpus the petitioner should be released. As the court explained (citing the Third Circuit's opinion in *Thomas*), this presumption "dates from an era, now far past, when habeas corpus lay only to test the jurisdiction of the detaining authority." *Walberg*, 776 F.2d at 136. Clearly, at that time it was necessary to

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[2] The *Carter* opinion dwelled heavily on those factors that might constitute "special reasons" to modify an initial order respecting custody under Rule 23(d). The court, without full discussion, summarily determined that the "special reasons" necessary for modification of an initial custody order were also necessary for an order denying release pursuant to Rule 23(c). *See Carter*, 781 F.2d at 995 n.4. There is no reason for this construction. The "special reasons" language of section (d) of Rule 23 clearly refers to "special reasons" for modification of an initial order, whereas Rule 23(c) does not refer to any special reasons, and thus arguably affords federal courts greater discretion to stay a petitioner's release pending resolution of the State's appeal. Thus, the concerns properly considered under section (d) may *a fortiori* properly be considered under the broader section (c).

release a petitioner upon a finding that there was no jurisdiction to detain him. The court found "now that habeas corpus is used as a method of correcting a broad range of constitutional errors . . ." the presumption can easily be overcome by a showing that the petitioner is likely to be reconvicted. *Id.*

Similarly, in *Lewis v. Henderson*, 356 F.2d at 106, in determining whether to release a habeas petitioner pending appeal of a district court decision granting habeas corpus, the court ruled that it was not required "as a matter of right" to order petitioner's release. The court decided not to release petitioner under the facts and circumstances of that case. *Id.* at 106. These circumstances included the petitioner's conviction of assaults with intent to commit murder and the certainty of retrial if the state's appeal failed. *Id.* Nor do these cases stand alone. A number of district courts have considered similar factors in determining whether a successful habeas petitioner would be released. Indeed, as the Third Circuit admitted in *Carter*, the United States District Courts for the District of Delaware (a state within the Third Circuit) and the Southern District of Texas specifically have found dangerousness to be a proper consideration in determining whether to release a successful habeas corpus petitioner. *United States ex rel. Taylor v. Redman*, 500 F. Supp. 453, 459 (D. Del. 1980); *Sellars v. Estelle*, 450 F. Supp. 1262, 1265 (S.D. Tex. 1978), *aff'd*, 591 F.2d 1208 (5th Cir. 1979); *Cf. Hill v. Rose*, 579 F. Supp. 1080 (M.D. Tenn. 1983). These courts have found that bail-type considerations are appropriately weighed when considering release on appeal following a successful petition for release on habeas corpus.[3]

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[3] Some lower federal courts have granted the state's stay request but simultaneously released the petitioner on a bail that the petitioner could meet. *Hill v. Rose*, 579 F. Supp. 1080, 1090-91 (M.D. Tenn. 1983); *Cagle v. Davis*, 520 F. Supp. 297, 312-13 (E.D. Tenn. 1980), *aff'd*, 663

Petitioners assert that the Third Circuit's interpretation fails to pay heed to the clear intent of the rule in question and creates an unnecessary and intolerable danger to the community. It is simply not wise or necessary to require federal courts to blindly order the release of state prisoners in situations in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great.

B. Habeas Corpus Jurisprudence Dictates That Federal Courts Consider Vital State Interests in Deciding Whether to Grant Release Pursuant to Rule 23(c).

The *Carter* opinion's rigid and misguided interpretation of Rule 23(c) disregards the panoply of significant state interests that this Court has suggested must be weighed in evaluating the remedy to be afforded to successful habeas applicants. Title 28 U.S.C. sec. 2243 directs a trial court in a federal habeas proceeding to dispose of the matter "as law and justice require." When fashioning the appropriate relief for a habeas petitioner, this Court has instructed that the remedy should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing state interests and the public's interests. *United States v. Morrison*, 449 U.S. 361,

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F.2d 1070 (6th Cir. 1981). This seemingly inconsistent result reflects the confusion as to the scope of relief to be afforded a successful habeas petitioner and the criteria to be applied to assess the state's stay request. Where the habeas petitioner is shown to be dangerous, this form of relief serves no legitimate public purpose, since it amounts to an outright discharge. Not only does fixing a low bail virtually gut the import of a simultaneous order staying issuance of the habeas order, but more significantly, it affords the public no protection against an individual demonstrated to be dangerous. In short, while traditional bail procedures arguably might be invoked to guarantee against the flight of a habeas petitioner during the pendency of the state's appeal of the writ, *Carter v. Rafferty*, 781 F.2d at 997, they simply have no place when the state's request is based on a showing that the petitioner represents a danger to the community and that there is a likelihood of success on appeal.

364-65 (1981); *Galloway v. Stephenson*, 510 F. Supp. 840, 844-45 (M.D.N.C. 1981). At minimum, the law and justice standard embodied in section 2243 compels a district court to consider the habeas petitioner's dangerousness to the community and the chances that the order granting release will be reversed on appeal, in order to vindicate the interests of the state and the public before imprudently releasing the state prisoner from custody pending appeal. *Cf. Tate v. Rose*, 466 U.S. at 1303-04 (considering both chances of reversal and the state's burden if forced to release or retry).

Mechanically relying on the faulty standard set forth in *Carter*, the district court and the Third Circuit refused to stay respondent's release pending appeal without contemplating the important state interests that should have been weighed. The rulings below, in effect, rendered meaningless the state's right to appellate review of the order granting the habeas writ—a result that cannot be countenanced. *Hill v. Rose*, 579 F. Supp. at 1090. When the normal course of appellate review might otherwise cause the state's case to become moot, issuance of a stay is warranted. *Garrison v. Hudson*, 468 U.S. 1301, ___, 104 S. Ct. 3496, 3497 (Burger, C.J., Circuit Justice, 1984); *see In re Bart*, 82 S. Ct. 675 (Warren, C.J., Circuit Justice, 1962). Moreover, because the state's ground for appeal often may touch upon wide-reaching issues that affect large numbers of potential habeas petitions, the state is entitled to adequate time to obtain appellate review unhampered by the necessity of dealing with the problems incident to the possibility of new trials. *Grigsby v. Mabry*, 583 F. Supp. 629, 631 (E.D. Ark. 1983), *modified on other grounds*, 758 F.2d 226 (8th Cir. 1985), *rev'd on other grounds sub nom. Lockhart v. McCree*, ___ U.S. ___, 106 S. Ct. 1758 (1986). Additionally, in many cases the state would be forced to go to retrial without the benefit of evidence which a district court has ruled inadmissible on fourth,

fifth or sixth amendment grounds even though the district court's ruling in this regard is being reviewed on appeal.

The practical effect of the district court's habeas order in this case seriously jeopardizes the state's right to unfettered appellate review. Under the district court's order, the writ granting respondent's release from custody would be issued within 30 days unless the state took steps to retry him.[4] This mandate, coupled with the lower courts' refusal to issue the requested stay of respondent's release in direct response to the *Carter* decision, left petitioners with an intolerable Hobson's choice. The state could not hold petitioner without reinitiating a criminal prosecution. *See* N.J. Ct. R. 2:9-4, 3:26-1, 3:26-2. If petitioners moved for a retrial, however, their right of appeal effectively would be extinguished, because a federal court, bound by considerations of comity, would have to refrain from entertaining the appeal to avoid disrupting the on-going state criminal prosecution. *Stefanelli v. Minard*, 342 U.S. 117, 123-24 (1951); *United States ex rel. Abate v. Malcolm*, 522 F.2d 826, 827 (2d Cir. 1975); *Garrison v. Hudson*, 468 U.S. at ___, 104 S.Ct. at 3497. Consequently, petitioners'

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[4] When a habeas court finds error rendering a state judgment constitutionally infirm, immediate release from custody is rarely awarded as relief, and when it is, appellate courts have found abuse of the district court's discretion. *Hammontree v. Phelps*, 605 F.2d 1371, 1380-81 (5th Cir. 1979); *Ridge v. Turner*, 444 F.2d 3, 5-6 (10th Cir. 1971). The common practice in the district court is to order the prisoner's release within a specified time unless the defect identified by the district court is corrected before the time has elapsed—usually by a new trial. *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985). As the *Carter* court noted, a habeas writ ordinarily gives the state 60 to 90 days to correct the constitutional error, compared with the mere 30 days permitted by the district court here. *Braunskill v. Hilton*, 629 F. Supp. 511, 526 (D.N.J. 1986); *Carter v. Rafferty*, 781 F.2d at 994 n.1. However, the district court may and often does stay its judgment pending review by the appellate courts. *Rudolph v. Powell*, 478 F. Supp. 849, 852 (E.D. Wis. 1979); *United States ex rel. Sullivan v. Cuyler*, 553 F. Supp. 1236, 1243 (E.D. Pa. 1982), *aff'd*, 723 F.2d 1077 (3d Cir. 1983).

right to appeal would be mooted. On the other hand, if petitioners elected to pursue the appeal,[5] then respondent would be released after 30 days, even though he may have posed a danger to the community and the state likely would prevail on appeal. This scenario needlessly places communities at risk, and disdainfully regards the legitimate interests in public safety. *See generally Tate v. Rose*, 466 U.S. at 1304. By leaving the state with the repugnant option of having its appeal effectively mooted in order to possibly retain respondent in custody, the district court and the Third Circuit, relying on *Carter*, have made a mockery of the law and justice standard for habeas disposition. *See* 28 U.S.C. sec. 2243.

The significance of a state's right to appeal the order of a single district court judge cannot be overlooked in determining whether requirements of "law and justice" mandate release of all successful petitioners who do not present a risk of flight. *See* 28 U.S.C. sec. 2243; *Fed. R. App. P.* 23(c). A meaningful right of review for a state when a prisoner's conviction has been found invalid is consistent with the law of habeas corpus as it has developed in our system of federalism. The developments, both legislative and judicial, recognize the importance of comity. To the extent that a grant of a writ by a district court is held to require release, regardless of the merits of a state's appeal and the dangerousness of the petitioner, the right of appeal is diminished in derogation of principles of comity and finality that have shaped the development of the law defining the scope of the writ and in derogation of the federal interest in uniform application of federal constitutional law.

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[5] The state here timely perfected its appeal on March 20, 1986, within 30 days of the district court's conditional release order, in compliance with 28 U.S.C. sec. 2107. (JA-4 to 5). Although petitioners perfected the appeal, respondent was released from state custody on May 20, 1986. (JA-21 to 22).

Deference for state courts is reflected in numerous tenets of habeas corpus law. A petitioner may not seek relief from state custody unless he has a federal claim. 28 U.S.C. sec. 2254. No writ may issue unless the petitioner has "exhausted the remedies available in the courts of the state . . . ." 28 U.S.C. sec. 2254(b). Factual determinations of a state court are presumed to be correct. 28 U.S.C. sec. 2254(d). The exhaustion doctrine is one "designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings . . . ." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Similarly, the stated "cause and prejudice" standard applicable to procedural defaults by state prisoners is one that recognizes the cost of federal habeas review—"a reduction in the finality of litigation and frustration of 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights'. . . ." *Murray v. Carrier*, ___ U.S. ___, 106 S. Ct. 2639, 2645 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

Petitioners submit that the *de facto* restrictions that the Third Circuit approach to Rule 23(c) places on the state's right to appeal a grant of habeas are in derogation of and inconsistent with the deference to state court decisions that has shaped the developing contours of habeas corpus jurisprudence. In forcing a state to the choice of retrial, or appeal and the automatic release of a prisoner found guilty after a proceeding held valid in state court, the Third Circuit opinion gives too little deference to interests of comity and finality. A standard that would permit the district court who granted the writ or an appellate court to consider the likelihood of a state's success on appeal and the dangerousness of the person to be released would be more consistent with the principles that shape the scope of the writ. Other remedies, such as expedited disposition of appeals from orders granting the writ, would better balance the admittedly valid concerns of a prisoner whose confinement has been found to be constitutionally imper-

missible by a single district court judge against the legitimate state interests at stake. See, *e.g.*, *United States ex rel. Rice v. Vincent*, 486 F.2d 215, 216-17 (2d Cir. 1973) (reversing district court's order granting release pending appeal by the state and ordering briefing and argument on the appeal on an expedited basis); *cf. Johnson v. Scully*, 563 F. Supp. 851, 881 (E.D.N.Y. 1983) (Appendix B; opinion dated March 28, 1978) (where relief was due petitioner and the appeal process had been delayed by the state, release was appropriate).

Federal interests would also be better served by a construction of Rule 23(c) that would not deter appeals of orders granting the writ. Scholars have recognized that the writ facilitates this Court's interest in uniform application of federal law in the 50 states, an interest which this Court, with its limited resources, cannot serve by review of occasional state court judgments on direct review. *See, e.g.*, L. Yackle, *Postconviction Remedies* sec. 20 at 95-96 (1981). The interest is served by this Court's ability to "keep abreast of decisions in the eleven circuits." *Id.* at 96 (citing *Symposium—Habeas Corpus: Proposals for Reform*, 9 Utah L. Rev. 18, 27-30 (1964) (remarks of Professor Freund)), and *Stone v. Powell*, 428 U.S. 465 (1976) (Brennan, J., dissenting)). To the extent that a difficult choice of remedies leads a state to refrain from an appeal of a habeas grant that presents difficult or unsettled constitutional claims, the interest in uniform application of federal law is undermined. A decision on a claim adjudicated in a state court system is, in effect, reversed by a single district court judge. The problem of uniform application of federal law in the states becomes one of uniform application by federal district court judges.

In sum, interests in comity, finality and uniformity militate against a construction of Rule 23(c) that, like that of the Third Circuit, will discourage a state from appealing the grant of a writ. The "law and justice" require otherwise. 28 U.S.C. sec. 2243.

Fundamental fairness to the state and the general public dictates that federal courts evaluate additional factors, especially proofs of dangerousness, when they decide whether to release a habeas petitioner pending appeal of the issuance of a habeas writ. Yet, the Third Circuit, inexplicably swayed more by formalistic legal niceties than pure common sense, determined that dangerousness simply was irrelevant to the Rule 23(c) inquiry, presumably because a released habeas petitioner's risk to the community implicated a state rather than a federal interest. *Carter*, 781 F.2d at 997 & n.5. Quite to the contrary, a federal district judge would openly defy the law and justice standard set forth in 28 U.S.C. sec. 2243 and gravely disserve the public by casually releasing a prevailing habeas petitioner pending the state's appeal of a habeas order in the face of a showing that the petitioner constituted a public safety risk.

Dangerousness has been recognized as a factor appropriate to release decisions in analogous contexts. The Bail Reform Act of 1984 permits consideration of dangerousness as a factor relevant to a release decision pending trial, 18 U.S.C. sec. 3142(b), pending sentence and appeal by the defendant, 18 U.S.C. sec. 3143, and pending appeal by the government of various appealable orders, 18 U.S.C. sec. 3143. *See* 18 U.S.C. sec. 3143 (where the government appeals an order that is appealable pursuant to 18 U.S.C. sec. 3731, the release decision is made according to the standards applicable to pretrial release, sec. 3142). The legislative report accompanying the Bail Reform Act of 1984 is instructive. In the context of post conviction bail, the report notes, "release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law . . . ." S. Rep. No. 225, 98th Cong., 1st Sess. 26, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3209. Even prior to conviction, however, "the need to consider community safety in setting nonfinancial pretrial conditions of release . . ." is listed as the first in a series of problems the Bail Act of 1984 is

designed to address. *Id.* at 3, 1984 U.S. Code Cong & Ad. News at 3185.

Given this recognition of the propriety of consideration of dangerousness in other contexts, it seems anomalous for the federal system, despite concerns of comity, to refuse to consider dangerousness where a state seeks review of a grant of a writ of habeas in a case where the appeal represents a serious effort on the part of a state to rectify an erroneous grant of the writ. The open-ended language of Rule 23(c), which provides for release unless the court determines otherwise, does not require such an inconsistent approach to an analogous problem.[6]

The Third Circuit approach to release pending review of a decision granting the writ, furthermore, does not comport with common practice. Implicit in the numerous grants of stays of the writ that are issued without reasoned discussion, is a recognition of the fact that courts do consider a wide range of state concerns, at least wider than the risk of flight, in evaluating whether the total circumstances warrant an order that does not direct "release." *See Tate v. Rose*, 446 U.S. at 1304; *Rice*, 486 F.2d at 216 (and unpublished opinions of the Second Circuit cited therein); *Rudolph v. Powell*, 478 F. Supp. at 852 (court stays the habeas order 90 days to allow the state to retry the petitioner or, alternatively, if an appeal is taken, the order is stayed pending appeal); *Kennedy v. Pinkney*, 473 F. Supp. 1279, 1285 (C.D. Ill. 1979); *Shaffer v. Clusen*, 518 F. Supp. 963, 965 (E.D. Wis. 1981) (if the state elects to appeal a habeas order, "the execution of the writ will be stayed pending the results of the appeal").

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[6] Concededly the analogy is not perfect. Pending review of an order granting a writ, a successful petitioner is neither in the position of one awaiting trial nor in the position of one who is challenging a conviction on direct appeal. The Bail Reform Act of 1984 does not address the more analogous situation—the criteria for release of a federal prisoner during the pendency of a government petition for *certiorari* following reversal of a conviction by a federal court of appeals.

The lack of reasoned discussion in this context is indicative of the need for this Court to specify the considerations that are relevant to the complex decision required under Rule 23(c). In doing so, petitioners respectfully submit that the Court should look to the complex of factors relevant to the discretion granted. *See* Boskey & Gressman, *The 1967 Changes in the Supreme Court Rules*, 42 F.R.D. 139, 161 (1967) (noting that the 1967 amendment to Supreme Court Rule 49 gave "a measure of discretion to continue detention" pending appeal "when this seems desirable despite the ruling in his favor," and suggesting considerations of special characteristics, *i.e.*, physical or mental condition, that make detention "appear advisable"). As these concerns harmonize with those addressed by Rule 8 of the Federal Rules of Appellate Procedure, the rules should be construed in a similar fashion, taking account of diverse interests involved where the language of a rule granting discretion is sparse.[7] Under Rule 8(a), factors such as irreparable injury to the party seeking the stay unless it is granted, lack of harm to other persons and no harm to the public interest must be shown by the moving party to obtain a stay of a judgment. *See Hill v. Rose*, 579 F. Supp. at 1090 (applying *Fed. R. App. P.* 8(a) in the context of habeas; the court later ruled that Rule 8(a) was inapplicable and went on to set bail in an amount that the defendant was previously unable to meet). The language of Rule 8(a) itself authorizes but does not guide the exercise of discretion in granting stays. *See Fed. R. App. P.* 8(a).

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[7] In this regard, the number of cases addressing release pending appeal of habeas decisions as issues involving stays are significant. *See Grigsby v. Mabry*, 583 F. Supp. at 631; *United States ex rel. Rice v. Vincent*, 486 F.2d 215 (2d Cir. 1973) (reversing district court order granting release of successful habeas petitioner pending the state's appeal and staying order of district court; further noting that factors cited by the district court as relevant to the fact that flight was unlikely were present when the prisoner committed serious crimes).

Federal courts frequently have construed court rules that grant but do not guide the exercise of discretion to provide for consideration of all relevant concerns. For example, in *Carbo v. United States*, 82 S. Ct. 662 (1962), Justice Douglas, sitting as Circuit Justice, noted the sparseness of the language of Rule 46(a) of the Federal Rules of Criminal Procedure, which then governed bail pending appeal, and reversed the court of appeals' grant of bail under a narrow reading of the rule. *Id.* at 666. Justice Douglas further held that the safety of the community and the dangers of flight were important concerns. *Id.* (reversing grant of bail despite extreme likelihood of defendant's success on appeal); *see also California v. Harris*, 468 U.S. 1303 (Rehnquist, Circuit Justice, 1984). The broad and unspecific grant of discretion to deny release to a successful habeas petitioner, like other federal court rules, should be construed in light of the interests involved. In the case of Rule 23(c), those interests require a construction that would permit continuation of confinement pending resolution of a non-frivolous appeal by the state.

C. Petitioners Were Entitled to Show Respondent's Dangerousness to the Community and their Likelihood of Success on Appeal.

Petitioners were given no opportunity whatsoever to press any claim concerning their chances of success on appeal while arguing before the district court for a stay of respondent's release. (See JA-8 to 16, Tr 7-4 to 11).

In this regard, it should be remembered that the New Jersey Superior Court, Appellate Division, agreed with the district court that the trial judge may well have committed error in not allowing respondent to present an alibi witness. That court ruled, however, that under the facts of this case any such error was harmless. This is precisely the argument which we have presented in the appeal which is now pending before the Third Circuit.

The state court found that the properly introduced evidence led "overwhelmingly and inexorably to the conclusion of defendant's guilt." (Third Circuit Motion Appendix at 99). This evidence included the fact that two unrelated eyewitnesses made unhesitating and clear identifications of respondent. The victim gave a description of respondent which was corroborated by the eyewitnesses and identified respondent in court. Most importantly, respondent himself admitted on cross-examination that he was in the immediate vicinity of the scene of the crime within one-half hour of the time when the crime occurred. (Third Circuit Motion Appendix at 101 to 102). Based on these facts, the Third Circuit should reach the same result as the New Jersey court and petitioners should prevail on appeal.

Respondent has argued that petitioners were given a full and fair opportunity to argue the issue of dangerousness. This argument is strained. The transcript of the stay hearing before the district court indicates that the State repeatedly attempted to argue dangerousness and that the court repeatedly refused to consider this issue. The only issue the court considered was the possibility of flight. (JA-8 to 16; Tr 7-14 to 15; Tr 8-30 to 9-10; Tr 9-14 to 17; Tr 13-6 to 13). The opportunity to present an issue which the court feels it cannot consider and which the court does not consider can hardly be considered "a full and fair opportunity to substantiate" a claim. (Respondent's brief in opposition to *certiorari* at 4-12 to 13).

Apart from the present offense, respondent was convicted of the crimes of burglary and theft. Thus, the present crime is not the only serious crime of which respondent has been convicted. Moreover, the evidence in the present case demonstrated that respondent attacked a 69-year-old woman in her apartment building, grabbed her by the throat and threw her to the floor while she pleaded with him to just take her money. Respondent placed a knife to the victim's throat. When she struggled to avoid having her throat slit, she was cut on both hands. Respondent

then forced the victim to perform fellatio. Petitioners believe that these facts, in conjunction with respondent's record, demonstrate his dangerousness. At the very least, they are factors which should have been considered by the federal courts.

POINT II. THE CONTINUATION OF A SUCCESSFUL HABEAS PETITIONER'S DETENTION NEITHER UNDERMINES THE PURPOSES OF HABEAS CORPUS NOR VIOLATES DUE PROCESS.

Respondent has argued that a stay of a successful habeas corpus applicant's release pending review violates both the purposes of habeas corpus and the tenets of due process. (Respondent's Brief In Opposition to Petition for *Certiorari* at 9-10). We respectfully suggest that the granting of a writ of habeas corpus does not require the immediate release of a petitioner. Moreover, neither fundamental fairness nor due process are violated if a stay of release is granted in such a situation.

In *Carter v. Rafferty*, the Third Circuit Court of Appeals suggested that continuing the incarceration of a successful habeas petitioner pending appeal of the granting of the writ is somehow fundamentally unfair, and that where there is no evidence that the petitioner will not appear for further federal proceedings, the petitioner is entitled to release. *Carter*, 781 F.2d at 994. This suggestion is contrary to the historical underpinnings of habeas relief, the unique procedural posture of a grant of a habeas application and the formulae of due process as developed by this Court.

As noted in Point I, the presumption of release contained in the predecessors to Rule 23(c) has its origins in an era when habeas corpus lay only to test the jurisdiction of the detaining authority. *Walberg v. Israel*, 776 F.2d at 136. Where a determination is made that there is no jurisdiction to detain a habeas applicant, he is entitled to

unconditional release unless the order to release him is reversed by a higher court. Hence, the concept that a habeas litigant should be released was not based on any constitutional underpinning, but followed from the finding of a lack of jurisdiction by the court that adjudicated guilt. *Id.*; *see Preiser v. Rodriguez*, 411 U.S. 475, 485-87 (1973).

In later years, habeas corpus was invoked as a method of rectifying constitutional errors in state criminal trials. In such cases there is obviously no jurisdictional infirmity to continued custody. *Walberg v. Israel*, 776 F.2d at 136. Therefore, the Constitution no more requires the release of a successful habeas corpus petitioner pending appeal by the state than it requires release of a person who has prevailed on appeal pending further appeal by the government. *Id.* The absolute release of such a person is simply not constitutionally mandated; rather, it is permitted by means of statutes, court rules and tradition. *See Preiser*, 411 U.S. at 484, 486.

The existence of exceptions to the presumption of release contained in Rule 23(c) bear out the fact that immediate release is not mandated upon the grant of a writ of habeas corpus. As noted in Point I, the rule presumes that release will be granted "with or without surety, unless" a federal court "shall otherwise order." Even the *Carter* court recognized that where the applicant's future susceptibility to process is in question, release can be denied even if the state conviction for which the applicant is incarcerated is flawed. *Carter*, 781 F.2d at 997. No such exception would be acceptable if release were constitutionally mandated. Thus, it is clear that release is not required.

Moreover, continued detention pending appellate review of an order granting habeas corpus does not violate fundamental fairness. The fundamental fairness of detention, as a general principle, rests on two things: (1) whether there has been an adjudication of guilt in accordance with

due process; and (2) whether the detention constitutes punishment. Due process prohibits the imposition of *punishment* without a prior adjudication of guilt in accordance with due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). *See also Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). In the case of a successful habeas applicant, the applicant has not only been indicted, based on probable cause that he has committed the crimes charged, but also has been found guilty beyond a reasonable doubt. Moreover, his status as a successful habeas petitioner also means that an adjudication of guilt has been reviewed by state appellate courts and found to be sound, constitutionally or otherwise. *See generally Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. sec. 2254. The granting of a writ of habeas corpus represents only the judgment of a federal district court that the petitioner's adjudication of guilt was constitutionally flawed. A state has the right to appeal this judgment. *See* 28 U.S.C. sec. 2253; *Fed. R. App. P.* 4(a). Since the constitutionality of the applicant's adjudication of guilt is still at issue, there is no fundamental unfairness to the continuation of punishment by virtue of staying release pending appeal. *See, e.g., Tate v. Rose*, 466 U.S. at 1304 (balancing the equities involved where a state sought a stay of an order granting release of a successful habeas petitioner, and determining that those equities tipped in favor of continuing confinement pending the resolution of the state's appeal from the issuance of the writ); *accord United States ex rel. Rice v. Vincent*, 486 F.2d at 216-17; *cf. California v. Prysock*, 451 U.S. 1301 (Rehnquist, Circuit Justice, 1981) (granting state's request for a stay of a state court judgment); *Fare v. Michael C.*, 439 U.S. 1310 (Rehnquist, Circuit Justice, 1978) (granting stay of a decision of the California court; stay granted after consideration of the "balance of equities" and the likelihood of a grant of *certiorari*); *Carbo v.*

United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962) (reversing grant of bail pending appeal, even where defendant's success was likely, after considering the likelihood of retrial and defendant's dangerousness); *Leigh v. United States*, 82 S. Ct. 994 (Warren, Circuit Justice, 1962) (bail pending appeal may be denied where defendant presents a danger to the community).

While petitioners assert that staying a successful habeas applicant's release from custody pending federal appeal is a justifiable continuation of punishment, recent decisions of this Court suggest that detention under these circumstances does not constitute punishment and therefore does not implicate due process. This Court has recognized generally that not all sanctions, even those involving detention, constitute punishment. It has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. at 168; *Flemming v. Nestor*, 363 U.S. 603 (1960); *cf. DeVeau v. Braisted*, 363 U.S. 144, 160 (1960). In *Kennedy v. Mendoza-Martinez*, this Court described the factors traditionally used in determining whether a governmental act is punitive in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy, at 168-69 (footnotes omitted). In *Bell v. Wolfish*, this Court described the distinction as one in which the court examining the challenged action "must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538. Absent a showing of an express intent to punish, this determination will generally turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Schall v. Martin*, 467 U.S. 253, 269 (1984) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69).

In *Schall v. Martin*, this Court used the foregoing analysis to determine that the preventive detention of accused juveniles under the New York statute was not punishment. It not only examined the particular conditions and limitations of the detention but also noted the purpose of the detention—the protection of both the community and the juvenile from "the hazards of pretrial crime." 467 U.S. at 274. Similarly, in the context of an appeal of a decision to grant a writ of habeas corpus, where the defendant has been previously convicted of a crime involving dangerousness, continued detention seeks to curtail reasonably predictable conduct, not merely to punish for prior acts. *See United States v. Edwards*, 430 A.2d 1321, 1332 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). Additionally, since the criteria urged by petitioners would combine dangerousness with a likelihood of the state's success on appeal, the detention would have the added purpose of maintaining control over the habeas applicant while the state vindicates the judgments of the state courts and the constitutional validity of his incarceration. *Cf. Fare v. Michael C.*, 439 U.S. at 21 (noting the significance of preserving the state's right to appeal a state court decision based on federal law).

In *Schall v. Martin*, this Court rejected the argument that using a prediction of dangerousness as a basis for detention was unfair because of the risk of error and noted that there was "nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S. at 278. This Court has upheld the use of predictions of dangerous conduct in ways that impact on liberty interests in a number of other situations. In *Jurek v. Texas*, 428 U.S. 262 (1976), this Court upheld a state death penalty statute that allowed the jury to consider the likelihood that the defendant would engage in future anti-social conduct. The Court has also held that parole boards may properly attempt to predict dangerous behavior in making parole decisions in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and in *Morrissey v. Brewer*, 408 U.S. 471 (1972). Most recently, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court upheld the constitutionality of using the testimony of a psychiatrist at the penalty phase of a capital case which included a prediction that the convicted murderer was likely to engage in future violent conduct.

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.

Jurek v. Texas, 428 U.S. at 274-76. There can be no better predictor of dangerousness than that which exists in this case—a state court jury has convicted the defendant of a crime of dangerousness. The fact that a district court has found a single infirmity in that conviction does not detract from this argument; the district court's finding is the subject of appellate review and may well be reversed.

In its due process analysis in *Schall*, this Court also considered whether the detention at issue served a legit-

imate state objective. *Schall*, 467 U.S. at 263. The Court found that the detention served a number of legitimate governmental interests not the least of which was the "legitimate and compelling state interest" in protecting the community against crime. *Id.* at 264-68 (quoting *DeVeau v. Braisted*, 363 U.S. at 155). In concluding that this interest, along with the state's interest in the protection of the accused juveniles themselves justified their limited detention, this Court answered the question it left open in *Bell v. Wolfish*: "whether any governmental interest other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention." 441 U.S. at 534.

This same state objective to which this Court gave such importance in *Schall* applies equally when a district court decides whether to stay the release of a victorious habeas petitioner who is shown to be dangerous. The State's interest in protecting the community from the crimes likely to be committed by these individuals is but one of the many interests sought to be vindicated by the applicant's continued detention while the state appeals the district court's decision. While an adult's interest in liberty may not be subordinate in the same way *Schall* held that a juvenile's liberty interests are, by reason of his youth,[8] the adult detainee's interests are counterbalanced by the additional state interests implicated in a pending appeal of the grant of a habeas writ. The state has an especially keen interest in the vindication of the judgments of its courts through appeal of a grant of a habeas petition. Further, there is a strong interest in the maintenance of comity between the state and federal courts and in the finality of the criminal process. *See generally Murray v.*

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[8] In *Schall*, this Court found that the juvenile's interest in freedom from unconstitutional restraints was subordinated to the state's *parens patriae* interest in preserving and promoting the welfare of the juvenile. 467 U.S. at 265-67.

Carrier, ___ U.S. at ___, 106 S. Ct. at 2645. Where a federal district court unilaterally concludes that the judgments of an entire assemblage of state courts were wrong about the fairness of a habeas petitioner's trial, the public has a strong interest in seeing this district court judgment tested by the appellate process before a dangerous offender is allowed to return to the community.

Moreover, the societal interest in protection against crime does not vary in strength with the age of the person to be detained. If anything, the need to shield the community from crimes committed by adults who are released either pending trial or pending the state's appeal on a habeas decision is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses. *United States v. Salerno*, 794 F.2d 64, 76 (2d Cir. 1986) (Feinberg, J., dissenting), *cert. granted*, ___ U.S. ___ (1986).[9]

Despite this Court's acceptance of using the likelihood that the detainee will commit further crimes as a criterion for detaining an individual, the court of appeals in *Carter v. Rafferty* simply dismissed the issue of dangerousness as an irrelevant factor in the equation of staying the release of a successful habeas applicant. In doing so it wrongly dismissed the state's paramount interest in protecting the community from crime. *Carter* completely overlooks the

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[9] In *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986), *cert. granted*, ___ U.S. ___ (1986), the Court of Appeals for the Second Circuit held that the federal Bail Reform Act of 1984 violated due process because it permitted pretrial detention on the ground of danger to the community. Petitioners observe that this Court recently granted *certiorari* in this case. Other circuits, however, have upheld the constitutionality of pretrial detention on grounds of dangerousness, finding no violation of due process in the use of dangerousness as grounds to deny bail. See *United States v. Portes*, 786 F.2d 758 (7th Cir. 1986); *United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985). *See also United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

fairness of the detention at issue, both to the individual and to the state, and does not even attempt to reconcile its conclusion with this Court's due process analysis of detention in other contexts. Petitioners submit that the suggestion implicit in *Carter* that a successful habeas applicant is constitutionally entitled to be released is wrong. We assert that detaining a successful habeas applicant pending the appeal of the district court judgment on the grounds that he is dangerous and that the state is likely to succeed on the appeal does not defeat the principles of fundamental fairness as encompassed by the due process guarantee.

POINT III. THIS CASE SHOULD NOT BE DISMISSED AS MOOT BECAUSE IT IS 'CAPABLE OF REPETITION, YET EVADING REVIEW'.

This case involves a situation in which respondent has been released from state custody even though petitioners have appealed the district court decision which granted habeas corpus relief. Respondent has argued that this Court should not decide this case because it may become moot by virtue of a decision by the court of appeals prior to the time when a decision is reached by this Court. We respectfully suggest that the mootness doctrine is not applicable to this case, since this is a situation which will definitely be repeated but may always become moot before this Court has the opportunity to render a full opinion.[10]

It is undoubtedly true that under any of several scenarios this Court's final decision may not affect this particular respondent.[11] It is equally true, however, that if

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[10] We note that since respondent would have been required to serve at least seven more months of incarceration had the writ of habeas corpus not been granted, the case is not moot at the present time.

[11] There are three scenarios under which this case could become moot prior to the decision by this Court. The court of appeals could reverse

this Court were to declare this case moot and not reach a decision on this important issue for that reason, the issue may never be decided. This is due to the nature of the issue presented.

The dilemma presented in this case is real and is likely to recur. The issue of the standards for granting a stay

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the order of the district court which granted the writ of habeas corpus. Alternatively, the circuit court could reverse the order granting the writ and remand for further hearings before the district court. If either of these results are obtained, petitioners could immediately reincarcerate respondent. Of course, respondent could move for a stay of reincarceration under *Fed. R. App. P.* 23(b). In such a situation, there would be a presumption in favor of incarceration and the issues presented in this case would not be implicated. If respondent petitioned this Court for *certiorari*, he could move for continued release from custody under Rule 41 of the Supreme Court Rules. Again, the specific rule upon which this case is based, Rule 23(c) would not apply. If either of these eventualities occurs prior to a decision by this Court, this Court's opinion would not affect the outcome of this case. Still, as will be argued below, a decision should be reached on the issues presented in the petition for *certiorari*.

It is also possible that the court of appeals will affirm the district court order which granted habeas corpus. If petitioners decided not to petition for *certiorari*, the issue in this case would appear to be moot. Again, a decision on the issue presented in the petition would still be warranted.

If, on the other hand, petitioners decided to petition for *certiorari* from an adverse decision of the court of appeals, we could conceivably move before either the court of appeals or this Court under Rule 41(3) of the Rules of the Supreme Court to have respondent incarcerated. Since Rule 41(3) is identical to *Fed. R. App. P.* 23(c), moving before the court of appeals would be futile since the dictates of *Carter v. Rafferty*, 781 F.2d 993 (3d Cir. 1986) would still apply. A motion before this Court would have greater theoretical utility. Reaching decision on such a motion, however, would require this Court to determine the standards for permitting incarceration of a person who has obtained a writ of habeas corpus—the very issue presented in the present appeal. It would be more expedient for the Court to decide the issue within the context of the immediate appeal rather than to later decide the issue on the basis of a motion.

of release pending appeal following the grant of a writ of habeas corpus can, by definition, only be presented in a case in which one of the parties has taken an appeal on the underlying merit of the habeas corpus petition. The petition for *certiorari* from the grant or denial of the stay must be prepared simultaneously with the preparation of the court of appeals' brief on the merits. Indeed, in most cases the petition would not be due until after the court of appeals brief has been filed. *Cf.* 28 U.S.C. sec. 2101(c); 28 U.S.C. sec. 2107. The case will be fully briefed in the court of appeals before this Court even has the opportunity to decide whether to grant the petition for *certiorari*. Naturally, the case also will be ready for decision by the court of appeals before this Court has even received the briefs on the merits. Thus, the court of appeals will almost always reach a decision on the merits of the appeal before this Court will have the opportunity to set the standards for granting a stay pending that appeal. Failing to decide this issue on the basis of mootness would be the equivalent of determining that the issue will never be decided.

This scenario represents exactly what has happened in the present case. Respondent's writ of habeas corpus was granted on February 27, 1986 and became final 30 days from that date. (JA-3). A notice of appeal on the merits was filed on March 20, 1986. (JA-4 to 5). Petitioners' motion for a stay of respondent's release was denied by the district court on March 26, 1986. (JA-17 to 18). On May 16, 1986, petitioners moved before the Third Circuit Court of Appeals *en banc* for a stay of respondent's release. (JA-19 to 20). An order was entered denying this motion on May 27, 1986. (JA-21 to 22). Petitioners' appellate brief on the merits was filed on June 20, 1986. Respondent's brief on the merits was filed on July 24, 1986. The petition for *certiorari* from the Third Circuit's denial of a stay of respondent's release was filed on July 24, 1986. The responding brief was filed on September 8, 1986. A reply brief was filed on September 11, 1986. This Court granted

certiorari on October 14, 1986, and tentatively scheduled argument for the March 1987 calender. (JA-23). In the meantime, argument on the merits of the appeal to the Third Circuit was heard on October 27, 1986. Based on the Internal Operating Procedures of the Third Circuit,[12] an opinion will be filed *no later than* February 1987. Based on experience, an opinion can be expected well in advance of that date.

It is clear that the court of appeals will have the opportunity to decide the merits of the underlying habeas corpus petition before this Court can issue an opinion concerning the standards which should be applied in determining whether a stay of release should be granted. The facts of this case are not unique, however. It is often possible to obtain an opinion from the court of appeals in less time than it takes to obtain a full opinion from this Court.

It would, of course, have been possible for petitioners to have moved before this Court for a stay of respondent's release. Such a motion would have presented the same issues which were presented in the petition for *certiorari* and would have been decided before the Third Circuit issues its opinion on the merits. This procedure could be used in all future cases, thus avoiding the problem of mootness. Still, an approach of this type would not have solved the underlying problem. What is needed is not a piecemeal approach to erroneous factual determinations by the court of appeals, but rather, uniform and correct standards by which the lower courts can themselves resolve the factual disputes. Even if petitioners had moved before this Court for a continued incarceration pending appeal and such a motion had been granted, the standards enunciated in *Carter* would still be binding on the district courts. Only a full opinion by this Court can overrule this opinion. It

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[12] U.S. Ct. App. 3d Cir. I.O.P. ch.5 (Opinions), sec. 3 (1984).

is simply not possible to obtain such an opinion prior to the time at which the court of appeals will have the opportunity to decide the underlying case.

A finding that this Court's opinion may not affect this particular respondent does not end the inquiry. It is clear that a case in controversy existed at the time the petition for *certiorari* was filed, at the time it was granted and at the present time. Additionally, it is clear that in the event that this case becomes technically moot at some later date, it fully satisfies the "capable of repetition, yet evading review" exception to mootness.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court noted that "[t]he usual rule is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated." *Id.* at 125. The Court went on to note, however, that the law should not be so rigid as to deny adjudication of an issue which is truly "capable of repetition, yet evading review." *Id.* This is such a case.

There can be no doubt that the situation in this case is likely to recur. Indeed, it will inevitably recur. Criminal defendants who have committed serious crimes will continue to petition for habeas corpus relief. Some of these defendants will obtain relief. These cases often involve important constitutional issues. (In fact, relief in the habeas context can only be granted if the constitution, laws or treaties of the United States have been violated. 28 U.S.C. sec. 2254(a)). Many of these cases involve questionable decisions which are worthy of appellate review and may well be subject to reversal. Moreover, the defendants involved in these cases frequently pose a danger to the community if released. Yet, under the opinion in *Carter*, their release can be stayed pending appeal only if it can be shown that they are likely to flee. It is certain that this scenario will be repeated in future cases if a decision is not rendered in the present case. In fact, this

very case simply repeats the problem first encountered in *Carter*.

Petitioners recognize that this Court has set forth strict limits to the "capable of repetition, yet evading review" exception to the mootness doctrine. This case falls within these limits. In *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), the Court followed *Weinstein v. Bradford*, 423 U.S. 147 (1975), which stated:

> in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

423 U.S. at 149.

In *Murphy*, the criminal defendant had brought a 42 U.S.C. sec. 1983 action seeking declaratory and injunctive relief of state trial court orders denying him pretrial bail. His trial was completed prior to any action by the district court. 455 U.S. at 480. The court of appeals declared that the case was not moot because defendant's convictions might be overturned on appeal and he might be again subject to pretrial detention without bail. This Court reversed the court of appeals, holding that the "capable of repetition yet evading review" exception to the mootness doctrine did not apply since the possibility of repetition of the same injury to the same party was so theoretical. *Id.*

In *Lane v. Williams*, 455 U.S. 624 (1982), defendants pled guilty to burglary, but were not informed that their sentences would involve mandatory parole terms. They filed petitions for habeas corpus requesting specific performance of these negotiated pleas. This relief was granted by the district court. On appeal, the matter was remanded on

exhaustion grounds. Prior to the district court rehearing, both defendants were released from prison; therefore, the district court simply entered an order declaring defendants' parole ineligibility terms void. The state appealed the district court decision and the court of appeals affirmed, ruling that the case had not been made moot by defendants' release from custody. On *certiorari* review this Court vacated the judgment of the court of appeals and ordered that the case be dismissed as moot. This Court reasoned that since the district court's final opinion could not have provided the relief requested by the defendants (release from the parole ineligibility term), and since there was no reason to expect that the injured party (defendants) would again be subjected to the same action, the "capable of repetition, yet evading review" doctrine should not have been applied. 455 U.S. at 633-34. Since the case should have been dismissed at the district court level, no valid underlying order existed from which to appeal.

In the present case, the injured party, the State of New Jersey, is susceptible to future injury and that injury is not speculative. The *Carter* case amply demonstrates the likelihood that petitioners will be exposed to the same injury again. It is not speculation to assume that the same circumstances will occur repeatedly. *Vitek v. Jones*, 455 U.S. 480, 486-87 (1980); *Prieser v. Newkirk*, 422 U.S. 395, 402 (1975); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Moreover, as has previously been demonstrated, the harm presented in a case such as this one is not preventable by any action which the injured party can take. *Cf. United States v. Munsingwear*, 340 U.S. 536, 539-40 (1950).[13]

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[13] Even if this Court finds that petitioners conceivably could have taken some action which could have ensured review by this Court prior to a decision on the merits by the court of appeals, we suggest that a decision should be reached in the present case. Clearly this case was not moot at the time the petition was granted and is not yet moot.

In addition, it must be noted that the time duration of the challenged action, *e.g.*, the time which elapses from the granting of a writ of habeas corpus to resolution of the case by the court of appeals, is too short to permit the issue of the standard involving stays pending appeal to be fully litigated prior to the action's expiration due to a decision by that court.

Based on these arguments, petitioners suggest that even if at some future date this case becomes moot because of the action of the court of appeals, it would still come within the capable of repetition, yet evading review exception to mootness. Therefore, this Court should properly decide the issue presented in the petition for *certiorari*.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit denying petitioners' request to stay respondent's release during the pendency of the State's appeal be reversed.

In all cases concerning this issue, mootness will be determined by the speed with which this court and the court of appeals render their respective decisions. To require petitioner to release other prisoners, perhaps more dangerous than respondent, in order to engage in a race with the court of appeals would be improper.

Respectfully submitted,

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Dated: November 26, 1986

(6)

Supreme Court, U.S.
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No. 86-108

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, SUPERINTENDENT,
NEW JERSEY STATE PRISON, ET AL., PETITIONERS

v.

DANA BRAUNSKILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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25 pp

QUESTION PRESENTED

Whether Fed. R. App. P. 23(c) permits a federal court, when deciding whether to order the immediate release of a state prisoner who has been awarded habeas corpus relief, to consider the state's likelihood of success on appeal and the prisoner's danger to the community.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-108

GARY HILTON, SUPERINTENDENT,
NEW JERSEY STATE PRISON, ET AL., PETITIONERS

v.

DANA BRAUNSKILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The question in this case is whether Fed. R. App. P. 23(c) allows a federal court, when deciding whether to order the immediate release of a state prisoner who has been granted habeas corpus relief, to consider the state's likelihood of success on appeal and the prisoner's danger to the community, in addition to the risk that the prisoner may flee the jurisdiction. The Court's resolution of that question will affect federal law enforcement in several ways. First, Fed. R. App. 23(c) has been applied by the federal

courts to determine whether to release a federal prisoner who has been granted relief on a collateral challenge to his conviction or sentence under 28 U.S.C. 2255. See *Ostrer* v. *United States*, 584 F.2d 594, 597 (2d Cir. 1978); *United States* v. *Dansker*, 561 F.2d 485, 486-487 (3d Cir. 1977) (en banc). Second, Fed. R. App. P. 23 will apply in a variety of actions brought against federal prison officials under the general habeas corpus statute, 28 U.S.C. 2241: namely, cases in which a federal parolee or probationer challenges the revocation of his release; cases in which a federal prisoner challenges the calculation of his parole release date; and cases in which a military prisoner challenges his conviction by a court-martial. See, *e.g.*, *Guerra* v. *Meese*, 786 F.2d 414 (D.C. Cir. 1986); *Calley* v. *Callaway*, 496 F.2d 701 (5th Cir. 1974); *Baker* v. *Sard*, 420 F.2d 1342 (D.C. Cir. 1969).

STATEMENT

1. Shortly after midnight on June 11, 1980, Jane Lyons entered the lobby of her apartment building in Bloomfield, New Jersey, and walked to the mailbox in the rear of the lobby. At that point, respondent put his arm around Lyons' neck, threw her to the floor, exposed himself, and placed a knife against her throat. Petitioner then sexually assaulted Lyons. *State* v. *Braunskill*, No. A-3645-80T4 (N.J. Super. Ct. App. Div. Dec. 14, 1982), slip op. 2-3.

Respondent was subsequently convicted in New Jersey Superior Court of sexual assault and unlawful possession of a weapon, in violation of N.J. Stat. Ann. §§ 2C:14-2, 2C:39-5d (West 1982 & Supp. 1986). He was sentenced to a total of eight years' imprisonment. The Superior Court Appellate Division affirmed his

conviction and sentence (*State* v. *Braunskill, supra*),[1] and the New Jersey Supreme Court denied review.

2. Respondent thereafter filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. The district court granted respondent's habeas corpus petition and ordered that he be retried within 30 days or released (Pet. App. 1a). Petitioners moved the district court to stay its order pending appeal, and the district court denied the motion (*id.* at 12a-13a). Relying on *Carter* v. *Rafferty*, 781 F.2d 993 (3d Cir. 1986), the district court held that it could stay respondent's immediate release only if there was a risk that he might flee before he could be retried. The court found that petitioners had failed to show a risk of flight (Pet. App. 7a, 8a-9a). The court specifically rejected petitioners' argument that the court should consider respondent's danger to the community in determining whether he should be released (*id.* at 13a).

Petitioners filed a notice of appeal and sought a stay of the district court's order that respondent be released immediately. The court of appeals summarily denied petitioners' motion without an opinion (Pet. App. 19a-20a).

SUMMARY OF ARGUMENT

The language of Rule 23(c), Fed. R. App. P., is very broad. It provides that a prisoner shall be released pending the state's appeal from an order releasing him "unless the court * * * shall otherwise order." That language would appear to invoke the

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[1] That court found that "the testimony which was unquestionably properly adduced by the State was such as to lead overwhelmingly and inexorably to the conclusion of defendant's guilt" (*State* v. *Braunskill*, slip op. 2).

full equitable discretion of the court in determining whether the prisoner should be released. The court of appeals, however, held that Rule 23(c) permits the court to consider only the prisoner's risk of flight. According to the court of appeals, the prisoner's danger to the community and the likelihood that the state will prevail on appeal are not factors that a court may take into account in determining whether the prisoner should be released during the pendency of the state's appeal.

The court of appeals' conclusion is inconsistent with habeas corpus practice, the history of Rule 23, and the standards that apply generally to requests for stays of district court orders pending appeal. As the scope of federal habeas corpus expanded early in this century, the courts developed a practice of granting "conditional writs" of habeas corpus—orders directing the state to release the prisoner unless, within a specified period, the state granted relief such as a new trial. That practice developed in order to avoid the outright release of prisoners who might well remain convicted or be reconvicted after further proceedings in the state court. In effect, through the "conditional writ" practice, the federal courts were granting stays of their orders of release pending further proceedings that could lead to the prisoner's continued incarceration under a lawful state judgment. At the same time, the rule that became Rule 23(c), Fed. R. App. P., was modified to authorize the courts to refuse to release successful habeas petitioners pending the state's appeal from the order granting relief. As in the case of the "conditional writ" practice, the change in the predecessor to Rule 23(c) appears to have been intended to grant the courts broad equitable discretion in making the release decision.

In formulating standards to govern the propriety of release under Rule 23(c), the Court should look to the test that has traditionally been applied to requests for stays of district court judgments pending appeal. Under that test, a court must consider the moving party's likelihood of success on the merits, the potential injury to the appellant and other parties, and the public interest. Those standards are appropriate to the Rule 23(c) determination, because they are consistent with the broad equitable authority traditionally granted to courts in disposing of habeas corpus cases (see 28 U.S.C. 2243), and because the issuance of a stay pending appeal is closely analogous to the denial of a habeas petitioner's request for bail during the pendency of the state's appeal. Applying those standards in the bail setting, it is clear that both the state's likelihood of ultimate success, either on appeal or on retrial, as well as the prisoner's danger to the public, are legitimate concerns that a court can weigh in determining whether the prisoner should be released.

Although this case involves a state prisoner, Rule 23(c) also applies to federal prisoners who are successful in collateral attacks on their convictions. In that setting, the case for considering the prisoner's danger to the community is even more compelling. Although the federal bail statute does not apply directly to proceedings under 28 U.S.C. 2255, the policies of that statute counsel in favor of applying similar principles in the Section 2255 setting. Because Congress has authorized the pretrial detention of persons who are determined to be dangerous, it follows a fortiori that a prisoner's dangerousness should be a permissible factor for a court to consider where a prisoner is seeking release pending the government's

appeal from an order vacating his conviction. The prisoner is in a less favorable position than an indicted defendant, since the prisoner may be reincarcerated if the reviewing court reverses his release order or if he is reconvicted on retrial. For that reason, it would be perverse to construe Rule 23 in a manner that would prohibit a court from detaining a prisoner pending the government's appeal, even though the same prisoner could have been detained pending trial after his initial indictment.

ARGUMENT

A FEDERAL COURT, WHEN DECIDING WHETHER TO ORDER THE IMMEDIATE RELEASE OF A PRISONER WHO HAS BEEN GRANTED HABEAS CORPUS RELIEF, MAY CONSIDER THE PRISONER'S DANGEROUSNESS AND HIS LIKELIHOOD OF ULTIMATE SUCCESS

1. Rule 23(c), Fed. R. App. P., provides that when the prosecution takes an appeal from a district court order granting habeas corpus, the prisoner shall be released "unless the court * * * shall otherwise order." In *Carter* v. *Rafferty*, 781 F.2d 993 (3d Cir. 1986), the court of appeals held that in deciding whether to release a prisoner pending the prosecution's appeal, the court may take into account the prisoner's risk of flight, but not the prisoner's danger to the community. The court reasoned that Rule 23(c) creates a presumption that a prisoner who has been awarded habeas relief is entitled to an immediate release from custody. The only federal interest served by the Rule, the court concluded, is to ensure that the federal courts can return a prisoner to state custody if the state prevails on appeal. 781 F.2d at 995-997. Factors unrelated to the risk that a prisoner will

abscond, such as his danger to the community while at large, "have no relevance" to the Rule, the court held. Those matters, the court concluded, are for the state courts to consider (*id.* at 997).

The *Carter* court was correct that Rule 23(c) establishes a presumption that a successful habeas petitioner is entitled to release from custody. The terms of the Rule as well as its background support that conclusion. *Walberg* v. *Israel*, 776 F.2d 134, 136 (7th Cir.), cert. denied, No. 85-331 (Dec. 2, 1985); *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d 735, 743 (3d Cir.), cert. denied, 414 U.S. 878 (1973); *United States ex rel. Barnwell* v. *Rundle*, 461 F.2d 768, 770 (3d Cir. 1972). Moreover, the *Carter* court correctly recognized that a prisoner can be detained pending the state's appeal if there is a risk that he will flee if he is released. See *LaFrance* v. *Bohlinger*, 487 F.2d 506, 508 (1st Cir. 1973), cert. denied, 419 U.S. 1080 (1974); *United States ex rel. Rice* v. *Vincent*, 486 F.2d 215, 216 (2d Cir. 1973); *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 744; *United States ex rel. Taylor* v. *Redman*, 500 F. Supp. 453, 460 (D. Del. 1980). The state has a compelling interest in ensuring that a defendant will be available for trial (see *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951)), and the risk that a defendant will abscond has historically been a valid consideration for the court that must set bail (*e.g.*, 18 U.S.C. 3146, 3148 (repealed by the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141-3156)). That factor is no less relevant and no less important when a convicted defendant has been awarded a new trial.

The *Carter* court erred, however, in concluding that the only relevant consideration under Rule 23(c)

is the risk that a released prisoner will flee. Although the text of Rule 23 is silent with regard to the factors that bear on whether the prisoner should be released pending the prosecution's appeal, the practice followed by the federal courts in habeas cases sheds some light on this question.

By statute, federal courts in habeas cases are authorized "to dispose of the matter as law and justice require" (28 U.S.C. 2243). This Court has construed that statute and its predecessors to authorize federal courts to delay the issuance of a writ of habeas corpus until the state has had an opportunity to correct the constitutional violation that was the subject of the prisoner's motion. See *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 210 (1951); *Mahler* v. *Eby*, 264 U.S. 32, 46 (1924); *In re Bonner*, 151 U.S. 242, 261-262 (1394); see also *Cabana* v. *Bullock*, No. 84-1236 (Jan. 22, 1986), slip op. 15; *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1961); *In re Medley*, 134 U.S. 160, 173-174, 175 (1890); *Carter*, 781 F.2d at 994. As the Court explained in *In re Bonner*, the habeas corpus statutes "invested [the courts] with the largest power to control and direct the form of judgment to be entered in cases brought up * * * on *habeas corpus*." 151 U.S. at 261.

Relying on this Court's decisions, the lower federal courts developed the practice in habeas cases of issuing "conditional writs" of habeas corpus: *i.e.*, orders directing the state to afford a prisoner appropriate relief—such as a retrial or an evidentiary hearing—or to release him. A conditional writ of habeas corpus permitted the state to retain custody of a prisoner pending its decision to reprosecute him. In effect, through the use of the "conditional writ," the courts developed the practice of granting stays

of their release orders where equity and the public interest justified such action. See *Lewis* v. *Henderson*, 356 F.2d 105, 106 (6th Cir. 1966); *United States ex rel. Calhoun* v. *Pate*, 341 F.2d 885, 887 (7th Cir.), cert. denied, 382 U.S. 945 (1965); *O'Brien* v. *Lindsey*, 202 F.2d 418, 420-421 (1st Cir. 1953); *Painten* v. *Massachusetts*, 254 F. Supp. 246, 248-249 (D. Mass.), aff'd, 368 F.2d 142 (1st Cir. 1966), cert. granted, 386 U.S. 931 (1967), cert. dismissed, 389 U.S. 560 (1968); see generally *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 743 & n.7.

Similar considerations underlie the provision in Rule 23(c) that in effect authorizes the court to stay a district court's order discharging a prisoner for the period of time necessary for the state to appeal the district court's decision on the merits. The state's interest in the enforcement of its criminal laws and the judgments of its courts has no less force when a case is on appeal to a federal court of appeals than when the state is preparing to retry a prisoner. In both cases, the federal courts are called upon to preserve the status quo while the state seeks to reinstate the state court's judgment, either by way of retrial in the state court or by way of appeal in the federal system.

The background of Rule 23 provides further support for the view that the Rule is intended to grant federal broad equitable power to maintain the status quo pending appeal in appropriate cases. Rule 23 had its origins in a Rule of this Court adopted in 1886 to implement the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The Rule, Sup. Ct. R. 34.3, 117 U.S. 708 (1886), originally required that the prisoner be released from custody on his own recognizance pending an appeal from an or-

der discharging him. The mandatory nature of the rule remained unchanged during the following 80 years, even though the scope of habeas corpus review of state criminal proceedings expanded dramatically. See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); see generally *Wainwright* v. *Sykes*, 433 U.S. 72, 77-80 (1977).

In 1967, the Court revised the Rule governing the release of habeas petitioners and eliminated the mandatory requirement of the original Rule. The new Rule, Sup. Ct. R. 49.3, provided that the prisoner "shall be enlarged upon his recognizance, with or without surety, unless the court * * * rendering the decision, or the court of appeals or this court * * * shall otherwise order" (388 U.S. 980 (1967)). Shortly thereafter, the Court promulgated the Federal Rules of Appellate Procedure. Rule 23(c) of the Appellate Rules mirrored this Court's Rule 49.3.

In freeing courts from the restraints of the prior mandatory release requirement, neither the Court nor Congress gave any indication that the lower courts were to be confined in the exercise of their discretion under Rule 23(c) to a single factor, such as the prisoner's risk of flight. To the contrary, contemporary observers emphasized the broad discretion that the new rule was apparently designed to grant to the federal courts. See Boskey & Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139, 161 (1967):

> The amendment gives a measure of discretion to continue detention of the prisoner pending appeal when this seems desirable despite the ruling in his favor. Such discretion might be exercised in cases were officials responsible for the prisoner's detention have been allowed a

> period within which to re-try him or otherwise to cure procedural defects rendering the confinement illegal; moreover, in other situations, the physical or mental condition of the prisoner may make his detention pending appeal appear advisable even though he has prevailed on the merits in the district court.

While the background of habeas corpus practice and the development of Rule 23 suggest that the courts were intended to exercise broad discretion in determining whether and under what conditions to release successful habeas petitioners, they do not provide direction as to the standards that should be used in exercising that discretion. In seeking appropriate standards, we submit, the courts should look to the standards that apply in the closely analogous setting of requests for stays of district orders pending appeal.

Rule 8, Fed. R. App. P., is the rule that governs the granting of stays pending appeal. Under that rule, courts of appeals may stay the release of a prisoner pending appeal, just as they may stay any other type of order entered by a district court. See *Walberg* v. *Israel*, 776 F.2d at 135-136; *United States ex rel. Rice* v. *Vincent*, 486 F.2d at 216-217; cf. *Tate* v. *Rose*, 466 U.S. 1301, 1302 (O'Connor, Circuit Justice), motion to vacate stay denied, 467 U.S. 1249 (1984). Because the denial of bail to a successful habeas petitioner has the same effect as the issuance of a stay pending the state's appeal from an order granting habeas relief, it follows that the standard for granting bail under Fed. R. App. P. 23(c) should be the same as the standard for granting a stay under Fed. R. App. P. 8.

The standard that has traditionally governed the issuance of a stay pending appeal requires the court to balance four related factors: (1) whether the moving party has made a strong showing that he is likely to prevail on the merits;[2] (2) whether the moving party will be irreparably injured absent a stay; (3) whether the issuance of a stay will injure the prevailing party below; and (4) whether injunctive relief furthers the public interest. *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also, *e.g.*, *Garcia-Mir* v. *Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *United States* v. *Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983); *James River Flood Control Ass'n* v. *Watt*, 680 F.2d 543, 544 (8th Cir. 1982). To be sure, a habeas corpus proceeding involves considerations that are not present in other types of civil suits. Those differences, however, can be taken into account in applying the standard for a stay pending appeal and do not require that an altogether different standard be employed.

In this context, the first and third factors are complementary. When the state can show that it has a strong case on appeal or that it is likely to reconvict the prisoner at a retrial, both factors are met. The

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[2] This element of the Rule 8 standard does not require a moving party in every case to prove that it is more likely than not to prevail on appeal; rather, a moving party may obtain a stay pending appeal if it can establish a substantial case on the merits and show that the remaining factors strongly militate in favor of interim relief. *Ruiz* v. *Estelle*, 650 F.2d 555, 565-566 (5th Cir. 1981); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843-845 (D.C. Cir. 1977); see *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

second and fourth factors can be satisfied if the state can show that there is a risk that the prisoner will flee or that he will be a danger to the community if he is released. A prisoner's interest in being released from custody should be weighed heavily in the balance, but it is not dispositive. When the other factors cut strongly in favor of the state, the prisoner should remain in custody.

The *Carter* court therefore went wrong in concluding that a prisoner's danger to the community has no role to play in the determination whether to release him under Rule 23(c). A prisoner's dangerousness is a legitimate consideration when the question is whether he should be granted bail pending the direct appeal of his conviction. See 18 U.S.C. (Supp. II) 3143; *Rehman* v. *California*, 85 S. Ct. 8, 9 (1964) (Douglas, Circuit Justice); *Carbo* v. *United States*, 82 S. Ct. 662, 666, 669 (Douglas, Circuit Justice), aff'd, 369 U.S. 868 (1962); *United States* v. *Miller*, 753 F.2d 19, 24 (3d Cir. 1985). The situation here is not materially different. A judgment of conviction entered in a state court is entitled to deference. The district court's ruling that the prisoner should be awarded habeas relief casts doubt upon the validity of the state court's judgment, but the prisoner is still under a judgment of conviction until the district court's judgment is affirmed on appeal and becomes final. In the meantime, if the state can demonstrate that the prisoner will be a danger to the community if he is released, nothing in Rule 23(c) forbids a federal court from considering that evidence in order to determine whether detaining the prisoner best serves the public interest.

2. Although this case involves a state prisoner, it is important to note that Rule 23(c) applies to fed-

eral prisoners as well.[3] At least in the case of federal post-conviction proceedings brought under 28 U.S.C. 2255, the Bail Reform Act of 1984, 18 U.S.C. (Supp.

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[3] By its terms, Fed. R. App. P. 23 applies only to "habeas corpus proceeding[s]" and therefore would not appear to apply to post-conviction proceedings brought by federal prisoners under 28 U.S.C. 2255. See Rule 1 advisory committee note of the Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. 2255 note at 365 (explaining differences between habeas corpus actions and motions for post-conviction relief filed under 28 U.S.C. 2255). Two federal courts of appeals, however, have stated that Fed. R. App. P. 23 applies to Section 2255 proceedings. *Ostrer* v. *United States*, 584 F.2d 594, 597 (2d Cir. 1978); *United States* v. *Dansker*, 561 F.2d 485, 486-487 (3d Cir. 1977) (en banc). That conclusion is correct, for two reasons.

First, when the original version of the current Fed. R. App. P. 23 was adopted as a Rule of this Court in 1886, a federal prisoner could bring a post-conviction challenge to his conviction under the general habeas corpus statute. Rev. Stat. § 753 (1873-1874 ed.). In 1948, Congress enacted 28 U.S.C. 2255 as a substitute for habeas corpus for federal prisoners. See *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); *Hill* v. *United States*, 368 U.S. 424, 427 (1962). Neither Congress nor this Court, however, modified the then-current version of this Court's rule governing the release procedures for prisoners (Sup. Ct. R. 45, 306 U.S. 724 (1939)), and that Rule later became Fed. R. App. P. 23(c). Accordingly, in spite of the imprecision in language, it appears that Fed. R. App. P. 23(c) is intended to apply to federal post-conviction proceedings under 28 U.S.C. 2255, as well as true habeas corpus proceedings.

Second, Fed. R. App. P. 23 would apply to federal post-conviction proceedings in any event by virtue of Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. 2255 note at 372. Rule 12 provides that "[i]f no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable

II) 3141-3156, provides an additional reason why the foregoing principles should be applied under Fed. R. App. P. 23(c). Although the Bail Reform Act does not in terms apply to Section 2255 proceedings, the policies underlying the Act strongly militate in favor of its application in that setting. See *United States* v. *Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) (applying Bail Reform Act of 1966 (repealed by Bail Reform Act of 1984) when a federal prisoner was granted relief under 28 U.S.C. 2255); cf. *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982).[4]

The Bail Reform Act of 1984 establishes a comprehensive procedure authorizing the detention of a person in federal custody who has been charged with

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statute." No federal statute specifically adopts a standard for releasing a federal prisoner pending the government's appeal of a district court's order granting a Section 2255 motion. Therefore, even if Rule 23(c) were not directly applicable, the district courts would look to that rule as an analogous provision giving instructive guidance.

[4] The Bail Reform Act of 1984 does not apply when a federal prisoner has been denied relief under 28 U.S.C. 2255. *Cherek* v. *United States*, 767 F.2d 335, 337 (7th Cir. 1985); see *United States* v. *Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986) (Bail Reform Act of 1984 does not apply when a federal prisoner has been denied a motion for a new trial under Fed. R. Crim. P. 33); *United States* v. *Dansker*, 561 F.2d at 486-487 (same rule for Bail Reform Act of 1966). And, of course, the Bail Reform Act of 1984 does not apply to state prisoners at all, whether they have been awarded or denied habeas corpus relief. *Carter* v. *Rafferty*, 781 F.2d at 995 & n.3; *Cherek* v. *United States*, 767 F.2d at 337; see *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d at 741; *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Ballou* v. *Massachusetts*, 382 F.2d 292, 293 (1st Cir. 1967); *Hill* v. *Rose*, 579 F. Supp. 1080, 1091 (M.D. Tenn. 1983); *DeAngelis* v. *South Carolina*, 330 F. Supp. 889, 891 (D.S.C. 1971).

a crime, who is awaiting sentencing, or who has taken an appeal from a judgment of conviction. 18 U.S.C. (Supp. II) 3141-3143. The Act was the culmination of Congress's 18-year effort to establish coherent and fair standards for pretrial and post-trial release; it strikes a balance between an individual's interest in being free from confinement and the public interest in safety; and it establishes a number of safeguards to protect the liberty interests of accused and convicted persons. See generally S. Rep. 98-225, 98th Cong., 1st Sess. 3-36 (1983). The Bail Reform Act of 1984 plainly "covers the whole subject" (*Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982)) of the detention or release of federal defendants and prisoners pending trial, sentencing, and appeal, and it provides a relevant benchmark for the federal courts when deciding whether to release a federal prisoner who has been awarded relief under 28 U.S.C. 2255.

A contrary conclusion would be inconsistent with the provisions of the Bail Reform Act of 1984 providing for pretrial detention (18 U.S.C. (Supp. II) 3141) or for detention pending the government's pretrial appeal (18 U.S.C. (Supp. II) 3143(c)). For example, if a federal prisoner obtains relief on a collateral challenge to his conviction and the government elects to retry him rather than to appeal, the government is entitled to prove that the prisoner should be detained pending retrial. Similarly, if a defendant persuades a district court to suppress evidence before trial, the government may seek to have the defendant confined during the government's appeal. In both cases, the government is entitled to prove that the defendant should be detained because he is a danger to the community. There is no reason why the government

should be in a *worse* position pending the appeal of a district court's decision to release a federal prisoner under 28 U.S.C. 2255. The Bail Reform Act of 1984 therefore strongly militates in favor of permitting a federal prisoner in respondent's position to be detained pending the government's appeal because of his danger to the community.[5]

3. The only remaining question is whether petitioners have carried their burden under Fed. R. App. P. 23(c) and are entitled to a stay of respondent's release pending a decision by the court of appeals on the merits of their appeal. The court of appeals' summary affirmance order (Pet. App. 19a-20a) does not indicate whether that court concluded that petitioners' motion for a stay was foreclosed by that court's earlier decision in *Carter* v. *Rafferty*, *supra*, or was factually insufficient even under the standard that petitioners urged in the district court. In these circumstances, we submit that the appropriate course is to leave to the court of appeals on remand the task of applying the correct standard to petitioners' claims in the first instance.

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[5] We note that the federalism concerns underlying the decision in the *Carter* case (781 F.2d at 996-997) have no relevance when a federal prisoner obtains collateral relief under 28 U.S.C. 2255. When Rule 23 is invoked in that setting, there is no risk that the federal courts will intrude on "traditionally state concerns" (*Carter*, 781 F.2d at 997) or disrupt "matters of state policy" (*id.* at 997 n.5). The federal courts will simply apply the same "federal common law of detention" (*ibid.*) in that setting that they would apply if pretrial detention were involved.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent New Jersey State Prison, Trenton Jersey and W. CARY EDWARDS JR., Attorney General of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

On Writ Of *Certiorari* To The United States Court of Appeals For The Third Circuit

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QUESTIONS PRESENTED

Can the limited discretion to stay the enlargement of a prisoner who is granted a writ of habeas corpus conferred on federal courts by *Fed.R.App.P.* 23(c) be exercised on the basis of factors traditionally reserved to state courts that have no direct relation to the federal function in habeas cases?

Do principles of federalism and comity allow a federal court to make determinations regarding a defendant's dangerousness to the community that have always been regarded as being peculiarly within the authority of state courts to recognize and act upon?

Does a successful habeas applicant's status as an indicted but unconvicted defendant permit a federal court to stay his enlargement pending a state appeal in the absence of specific and unequivocal authorization in the language of Rule 23(c) or (d)?

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The opinion of the United States District Court for the District of New Jersey in this matter is reported as *Braunskill* v. *Hilton*, 629 F.Supp. 511 (D.N.J. 1986), and is reproduced in the appendix to this brief at App. 1 through 26.

The opinion of the United States Court of Appeals for the Third Circuit, which has been published, is reproduced in the appendix to this brief at App. 27 through 36.

STATEMENT OF THE CASE

Respondent adopts the statement of the case contained in the petitioners' brief on the merits[1] with one exception. Respondent was not convicted of aggravated sexual assault as charged in the indictment. Rather, he was acquitted of aggravated sexual assault and convicted of the lesser offense of second-degree sexual assault. *N.J.S.A.* 2C:14-2c.

Respondent also wishes to add the following: Respondent was released on May 20, 1986. On December 2, 1986, the United States Court of Appeals for the Third Circuit affirmed the judgment of the district court granting the writ of habeas corpus. (App. 27-36) Petitioners' motion for rehearing was filed with the Circuit Court on or about December 15, 1986.

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[1] References to documents other than the Joint Appendix (JA) will adhere to the following form:

Pb = Petitioners' brief on the merits.

Ab = brief of *amicus curiae* the Solicitor General of the United States.

Tr = transcript of the hearing held before the district court on March 26, 1986.

App = Appendix to this brief.

SUMMARY OF ARGUMENT

1. In *Carter* v. *Rafferty*, 781 F.2d 993 (3rd Cir. 1986), the United States Court of Appeals for the Third Circuit held that the limited discretion under *Fed.R.App.P.* 23(c) to stay the enlargement of a prisoner who is granted a writ of habeas corpus can only be exercised if matters are put in issue relating to his or her ability to respond to federal process or that in some other respect relate to the federal interest in habeas proceedings. Petitioners assail this holding, arguing that the very existence of discretion necessarily implies the authority to stay a prisoner's enlargement based on state interests that have no direct bearing on the federal role in habeas proceedings, and, in particular, the authority to order a stay based on a prisoner's alleged dangerousness to the community and the chances of success of the state's appeal.

Petitioners' argument is unsupported by the language of Rule 23(c), its history and development, and caselaw in analogous situations, all of which lend credence to the holding in *Carter*, *supra*. The language and history of the rule and the rules of this Court from which it is derived allow only two undeniable conclusions: first, that there is a weighty presumption favoring the release of a prisoner who has been granted a writ of habeas corpus; and second, that the federal interest in assuring the prisoner's future response to federal process was strong enough to justify the requirement of a surety in appropriate cases. The only other basis for a temporary delay in the prisoner's enlargement explicitly recognized by contemporaneous authorities, including caselaw, was the "conditional writ," *i.e.*, a brief period between the time that a writ was granted and the time that it would take effect to allow the state to correct the constitutional error that rendered the prisoner's conviction violative of due process of law. No published case involving either Rule 23(c) or (d) or its predecessor rules has ever granted a stay of enlargement

beyond the "conditional writ" period based on factors that are not entirely consistent with the holding in *Carter, supra;* certainly, no stay has ever been granted based solely on the prisoner's alleged dangerousness to the community. Similarly, although federal bail law is not directly applicable to state prisoners in habeas proceedings, at the time that Rule 23(c) was adopted the only situations where bail was denied involved either the danger that the defendant would flee the jurisdiction or the protection of the orderly progress of the federal criminal justice process itself—factors having a "federal content" that are completely consistent with the *Carter* holding. Nor can the potentially unbridled discretion posited by petitioners be brought within the context of *Fed.R.App.P.* 8(a), which is completely unsuited to the unique circumstances of the normal habeas proceeding.

Petitioner's theory also is completely inconsistent with considerations of federalism and comity that have guided this Court's approach to habeas jurisprudence. The deference that this Court traditionally has shown to state courts and state court decisions has never been applied to the state's right to appeal as an adversary party in a habeas proceeding and has never taken the form of allowing federal courts to enforce state law or state policy themselves. Instead, the underlying principles that have motivated this Court's approach to federalism have been to give states the opportunity to vindicate their legitimate interests in their own court systems and to respect determinations that are recognized as being within the exclusive province of state courts to make. The teaching of *Carter, supra,* that some decisions are peculiarly within the authority of state court systems to recognize and act upon is particularly appropriate when applied to the question of pre-trial detention of unconvicted defendants (including habeas releasees) because this is an area in which there is no consensus among the state and federal

jurisdictions themselves. As such, the *Carter* holding is far more consistent with federalism and comity concerns than petitioners' theory, which when applied to states such as New Jersey amounts to a plea for protection of law enforcement authorities from the laws of their own state. Furthermore, even if petitioners' right to appeal from the grant of writ of habeas corpus is entitled to a measure of respect, the "Hobson's choice" that they claim threatens that right simply does not exist. The issue of whether or not a prisoner will remain in custody ordinarily will not affect the state's strategic decision regarding whether to proceed with an appeal or forego the appeal in favor of a retrial. Even if it did, since the question of custody in either situation will appropriately be governed by reference to state law governing pre-trial indictees, the decision in *Carter* does not pose a threat to petitioners' interests.

Petitioners' contention that granting a stay of enlargement is a permissible "continuation of punishment" flies in the face of a successful habeas applicant's legal status as an indicted but unconvicted defendant. By granting a writ of habeas corpus, a federal court of competent jurisdiction has determined that a prisoner's conviction was obtained in violation of fundamental due process of law and, as such, is null and void for all intents and purposes. To suggest otherwise denies the very basis of the Great Writ as it has developed through history. The fact that the granting of the writ may be reversed on appeal does not mean that it is any less final while the appeal is pending and certainly does not provide a reason *per se* for a stay of the district court's judgment. "Continuation of punishment" is the antithesis of a valid reason for detention of a defendant in this legal position. Petitioners' reliance on cases that justify detention of defendants on dangerousness grounds on a basis other than punishment is misplaced because these cases involve either defendants who are subject to a legally valid conviction and/or deten-

tion pursuant to a state statute that, unlike Rule 23(c), unequivocally permits and provides meaningful procedural safeguards that guide judicial determinations of dangerousness. In any event, the constitutionality of such statutes is far from clear at this time.

2. *Certiorari* should be dismissed as improvidently granted in this case because it is not an appropriate vehicle for the discussion or resolution of the conflict between petitioners' construction of Rule 23(c) and that put forth in *Carter, supra*. The record below clearly discloses that if the *Carter* holding was rejected and this case was remanded, there is no reasonable possibility that petitioners can carry their burden of showing either that respondent is a danger to the community or that they are likely to obtain a reversal of the district court's order granting the writ. Furthermore, there is a distinct possibility that this Court will deny any petition for a writ of *certiorari* concerning the Third Circuit's affirmance of the granting of the writ before the instant matter is decided. If this eventuality occurs, then this Court must dismiss this matter as moot because the "capable of repetition yet evading review" doctrine does not apply to an issue that only will be important in the future in cases arising between petitioners and other prisoners not parties to this case.

LEGAL ARGUMENT

POINT I

LIMITATION OF THE SCOPE OF A FEDERAL COURT'S DISCRETION IN STAYING THE ENLARGEMENT OF A PRISONER WHO HAS BEEN GRANTED A WRIT OF HABEAS CORPUS TO THOSE FACTORS WHICH BEAR DIRECTLY ON THE FEDERAL FUNCTION IN HABEAS CASES IS ABSOLUTELY NECESSARY FOR THE MAINTENANCE OF AN APPROPRIATE BALANCE OF POWER BETWEEN THE STATE AND FEDERAL JURISDICTIONS.

Fed. R. App. P. 23(c) states in pertinent part that pending review of the granting of a writ of habeas corpus,

the victorious prisoner "shall be released upon [his or her] recognizance, with or without surety, unless" the federal court having jurisdiction of the case at the time of the motion for a stay "shall otherwise order." Rule 23(d) states that an initial order respecting custody or enlargement entered pursuant either to Rule 23(b) or 23(c) shall remain in force throughout the appellate process unless an appellate court or judge or justice shall modify it or enter an independent order "respecting custody, enlargement or surety" for "special reasons." Contrary to petitioners' suggestion (Pb 35-36), neither the ruling of the United States Court of Appeals for the Third Circuit in *Carter* v. *Rafferty*, 781 F.2d 993 (3rd Cir. 1986), nor respondent's position in this Court can be oversimplified into a bald claim that granting a stay of enlargement of a victorious habeas defendant for any reason whatsoever is *per se* fundamentally unfair or a violation of due process. Instead, the task that the *Carter* court set for itself was to interpret the limited discretion to stay enlargement afforded by Rules 23(c) and (d) by reference to factors that "have . . . relevance to the federal function in habeas cases." *Id.* at 997. The basic teaching of *Carter* is that the only grounds for denying enlargement of a prevailing habeas defendant "would have to relate to a federal rather than a state interest," *Id.* at 998 n. 6, or have some "federal content" on a par with the acknowledged "strong interest in assuring the appearance of the [defendant] in subsequent proceedings. . . ," *Id.* at 995, 997. Dangerousness to the community was not such a federal interest because it "is a matter traditionally reserved to the state authorities to decide" that "can only be made by the state in accordance with state procedures." *Id.* at 996.

The *Carter* approach has many elements that should recommend themselves to this Court. First, the very effort to distinguish factors with "federal content" from those that are the traditional concerns of state courts is consistent with the emphasis on principles of federalism

and comity that has been a highlight of this Court's approach to habeas cases in general. *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977). It also bespeaks recognition of this Court's belief that the scope of federal authority in habeas cases "is sometimes as much a matter of allocation as it is of analysis" and that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. ____, 106 S.Ct. 445, 452 (1985). Second, the holding that "the 'special reasons' to which Rule 23(d) refers must, *at the very least*, embrace those matters which are related to an assurance that the petitioner will appear in response to federal court orders," *Carter, supra* at 995 (emphasis added), is by its own terms not exclusive; indeed, the court went on to hold that factors such as dangerousness to the community could be considered if they related "to a petitioner's ability to respond to federal process,[2] or which in some other

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[2] Although petitioners mention both dangerousness to the community and likelihood of success on appeal as the factors that they would like a federal court to consider pursuant to Rule 23(c), they make no secret of the fact that they are "especially" interested in the dangerousness factor (Pb 30). The focus on the dangerousness factor is appropriate for any discussion of *Carter* if for no other reason than in that case the prosecutor never offered (and, therefore, the court never discussed) likelihood of success on appeal as a reason for staying the prisoner's enlargement. By necessity, then, respondents' brief will, where appropriate, focus on dangerousness when discussing the specific "state interests" that petitioners wish to have federal courts "vindicate" or enforce. Respondent does not concede, of course, that "likelihood of success" is *per se* a factor that would justify a stay of enlargement. However, it is significant to note that this factor is not squarely inconsistent with *Carter* because common sense would dictate that likelihood of success by the state on appeal would have a direct bearing on the "strong interest in assuring the appearance of [the defendant] in subsequent proceedings . . ." *Id.* at 995. It stands to reason that a prisoner who prevails in the habeas proceeding in district court who [unlike respondent] faces a lengthy

respect relate to the federal interest," *Id.* at 996-997. Finally, the opinion correctly points out that its ruling "does not leave the state without recourse" to resort to its own courts for vindication or enforcement of traditional state concerns.

The position of both the petitioners and the Solicitor General is that the very fact that Rule 23(c) and (d) invests federal courts with discretion to grant a stay of enlargement requires that the *Carter* court's reasoned and painstaking attempt to confine the "sparse" wording of Rule 23(c) and (d) to considerations that have clear federal content and leave other factors of purely state interest to the courts best able to apply them must be disregarded. Instead, petitioners ask that the rules be read to entrust federal courts "with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner" (Pb 21), regardless of whether or not those factors have anything directly to do with the federal role in the habeas context. Respondent submits that neither the wording and history of the rule nor the cases that have construed it up to now support such an open-ended and potentially boundless interpretation of the scope of the federal court's discretion. More significantly, it is contended that approval of the teachings of *Carter* by this Court is mandatory if the scope of the discretion allowed by Rule 23(c) and (d) is to be kept within bounds appropriate to the system of concurrent but separate powers of federal and state courts that gives life to "federalism and comity."

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sentence if the state prevails on appeal might be strongly tempted to flee the jurisdiction before the appeal has run its course. As noted later in this brief, this common sense connection between the merits of an appeal or retrial and the possibility of flight by a defendant traditionally has formed the basis for denial of bail in capital cases where "proof is evident and the presumption is great."

A. Neither The Wording Nor The Historical Development Of Rule 23(c) Support A Construction That Would Permit Federal Courts To Consider Or Rely Upon State Interests Not Directly Related To The Essential Purposes Of Habeas Corpus Proceedings As A Basis For Staying A Victorious Prisoner's Enlargement.

Petitioners repeatedly assail the *Carter* holding as "impractical," "dangerous," and at odds with "common practice." Yet it is petitioners who actually fail to pay heed to the clear intent of the rule in question and who misconstrue the detailed historical and legal analysis relied on by the Third Circuit. By far the most important precedent from which *Carter* draws support is *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d 735 (3rd Cir. 1973), *cert.* den. 414 U.S. 878 (1973), which contains a thorough and often-relied-upon history of Rule 23(c) and (d). As noted in that opinion, release of successful habeas petitioners was mandatory until 1967. At that time limited discretion was given to the federal courts in Rule 49 (now Rule 41) of this Court and, very shortly thereafter, in Rule 23(c) and (d):

> But it is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement.

Id. at 743.

Another change made in the Rule was the deletion of the phrase "for appearance to answer the judgment of the appellate court." However, as *Thomas* pointed out, "no change in substance was intended"; the federal court is still "naturally interested in the availability of the petitioner to respond to its judgment." *Id.* See also *LaFrance*

v. *Bohlinger*, 487 F.2d 506, 508 (1st Cir. 1973), *cert.* den. 419 U.S. 1080 (1974). It was this strong interest that formed the basis of the *Carter* opinion.

Unquestionably, the most significant facet of Rule 23 (c) is the weighty presumption in favor of releasing the defendant once a district court has granted a writ of habeas corpus—that the "prisoner *shall* be enlarged upon [his or her] recognizance" (emphasis added). *Carter*, *supra* at 994; *Thomas*, *supra* at 743; *United States ex. rel. Barnwell* v. *Rundle*, 461 F.2d 768, 770 (3rd Cir. 1972). The "shall" command is an accurate reflection of the very nature of the habeas remedy itself. "Discharge of conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody." *Brown* v. *Allen*, 344 U.S. 443, 465 (1953). Although contemporary habeas corpus proceedings serve as vehicles for the resolution of a variety of constitutional issues, the essence of habeas corpus is an attack by a person in custody on the legality of that custody, and the traditional function of the writ is to secure release from illegal custody. *Preiser* v. *Rodriguez*, 411 U.S. 475, 484-485 (1973); *Fay* v. *Noia*, 372 U.S. 391, 399 n.5 (1963); *Jago* v. *United States District Court, Northern District of Ohio, Eastern Division at Cleveland*, 570 F.2d 618, 620 (6th Cir. 1978). Thus every day that a prisoner continues to be incarcerated is another day that the State has deprived him of his liberty without due process of law. Since the presumption incorporated in Rule 23 (c) derives from the "core" or "heart" of habeas itself, *Preiser* v. *Rodriguez*, *supra* at 487, it follows that factors tending to overcome that presumption should be related to the basic rationale for federal jurisdiction in this area.

Contemporaneous authority construing Rule 23 (c) and Rule 49.3. (now 41.3) of this Court is quite as "sparse" as the wording of the rules themselves. What does exist, however, does not support petitioners' and the Solicitor

General's claim that the drafters of these rules meant to have federal courts exercise unbridled discretion to deny enlargement based on any "relevant" factor. B. Boskey and E. Gressman, "The 1967, Changes in the Supreme Court's Rules," 42 F.R.D. 139, 161 (1967), states that the rule gives a measure of discretion "when this seems desirable. . ."; however, the examples that are used to give content to this observation simply do not represent the "broad discretion" that the Solicitor General (Ab 10-11) and petitioners argue for. The article states that discretion "might be exercised in cases where officials responsible for the prisoner's detention have been allowed a period within which to retry him or otherwise to cure procedural defects rending the confinement illegal. . ." This particular exercise of discretion, however, does not relate to appellate review of the granting of the writ at all; instead, it represents a shorthand description of the practice of granting "conditional writs" pursuant to 28 U.S.C. § 2243, *i.e.*, an order specifying that the writ will not take effect (*i.e.*, the prisoner's custody need not be terminated) until the passage of a brief period during which the State has an opportunity to rectify the violation of due process that rendered the prisoner's conviction or sentence fundamentally unfair. *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1961); *Mahler* v. *Edby*, 264 U.S. 32, 45-46 (1924); *Byrd* v. *Smith*, 407 F.2d 363, 366 (5th Cir. 1969). As petitioners themselves point out (Pb 26-27), if the State responds to the terms of the conditional writ, any stay of enlargement pending the State's appeal would be moot. Nor can the article's reference to a prisoner's "physical or mental condition" readily be equated with the dangerousness factor that petitioners emphasize. (Pb 20) Instead, the phrase connotes situations in which medical considerations peculiar to the prisoner make complete release from custody either contrary to his or her best interests, see *Johnston* v. *Marsh*, 227 F.2d 528, 529 (3rd Cir. 1955) (prisoner

admitted to bail pending determination of his petition conditioned "upon his going to and remaining in a private hospital"), *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972), or, perhaps, might be in violation of a federal statute. See 18 U.S.C. § 4246(g), as discussed in *Carter*, *supra* at 996.

Petitioners make much of the fact that in *Carter*, *supra* at 997 n.5, the court acknowledged its disagreement with other decisions that "have held that more general 'bail' standards may be considered by a court in regard to the release of a prevailing habeas petitioner." Such an acknowledgment, however, does not imply that a real conflict between the circuits exists because the disagreement reflects a mere inconsistency in *dicta* regarding the general principles applicable to such cases; the results of the cases themselves can easily be reconciled with the holding in *Carter*. In *Walberg* v. *Israel*, 776 F.2d 134 (7th Cir. 1985), *cert.* den. ___ U.S. ___, 106 S.Ct. 546 (1986), for instance, the circuit court reversed the district court's denial of the habeas petition but stayed its mandate pending the disposition of the State's petition in this Court. Since the circuit court had not ordered petitioner's unconditional release to start with, it could not even decide "whether Rule 23(b) or Rule 23(c) applies." *Id.* at 136. The *dicta* regarding the presumption in Rule 23(c) that petitioners rely on (Pb 123), like the Boskey and Gressman example, does not refer to appellate review of the granting of the writ. Instead, the emphasis on "the error in [the prisoner's] existing incarceration being readily curable" because the state can "retry, reconvict, and reimprison" him clearly describes the nature of the conditional writ itself rather than the process of an appeal. *Id.* at 136. In any event, the result of the case turned not nearly so much on the court's construction of Rule 23(c) in *dicta* as it did on the fact that the prisoner had already offered to plead guilty to the very charge for which his conviction was

found to be unconstitutional, thus ensuring that he would "remain in prison for at least as long as the Supreme Court takes to act on the state's petition for certiorari . . ." *Id.* See also *United States ex rel. Rice* v. *Vincent*, 486 F.2d 215, 216 (2nd Cir. 1973); *Grigsby* v. *Mabry*, 583 F.Supp. 629, 631-632 (E.D. Arkansas 1983), modified on other grounds, 758 F.2d 226 (8th Cir. 1985), rev'd on other grounds *sub nom. Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986). The court's recognition that the prisoner would remain in jail regardless of its own action hardly amounts to a true conflict with the *Carter* holding that questions of dangerousness are more properly a concern of state courts rather than federal habeas courts.

The holding in *Lewis* v. *Henderson*, 356 F.2d 105 (6th Cir. 1966) presents even less of a real conflict with *Carter*. Firstly, it is a 20-year-old pre-Rule 23 opinion that does not even purport to construe the rules of this Court that existed at that time; instead, it considered the motion only under its own local court rule. *Id.* at 105. Secondly, and more importantly, that case did not even recognize the presumption of release of a successful habeas petitioner; instead, it relied on an even older case for the proposition that as a matter of policy, "it is by no means clear that as a matter of right and routine a state prisoner should be set at large pending [the State's appeal]." *Id.* at 106. As such, the *Lewis* decision clearly has been discredited by more recent cases construing Rule 23(c) and has lost all weight as authority. See *Thomas*, *supra* at 743 n.7; *Cagle* v. *Davis*, 520 F.Supp. 297 (E.D. Tenn. 1980), aff'd 663 F.2d 1070 (6th Cir. 1981). In any event, the reason that enlargement was stayed in *Lewis*, *supra* at 106, was because defendant faced trial (and presumably was being held) on a separate charge of attempted murder of a police officer. It is disingenuous to argue that reliance on such a factor presents a conflict with the emphasis on a petitioner's readiness to respond to federal process stressed in *Carter*.

Treatment of Rule 23(c) applications by federal district courts does not reflect widespread reliance on state-oriented "bail-type considerations." It is important to note that in none of the district court cases cited in the petitioners' brief (Pb 23) was the prisoner's enlargement stayed or revoked; at worst, the factors considered by those courts led them to condition enlargement on the posting of a surety sufficient to ensure petitioner's availability to federal process.[3] See *United States ex rel. Taylor* v. *Redman*, 500 F.Supp. 453, 460 (D. Del. 1980); *Sellars* v. *Estelle*, 450 F.Supp. 1262, 1265 (S.D. Texas 1978); *Hill* v. *Rose*, 579 F.Supp. 1080, 1090 (M.D. Tenn. 1983); *Cagle* v. *Davis*, *supra* at 312-313. Nor can "recognition . . . that courts do consider a wide range of state concerns" legitimately be extracted from court orders that petitioners themselves admit are "issued without reasoned discussion" beyond a brief mention of the fact that the State may file an appeal (Pb 31).

Petitioners opine that the *Carter* opinion's construction of Rule 23(c) is erroneous because that rule should be read in light of Rule 23(b) and (d). (Pb 22) To the contrary, Rule 23(b) is not even cited in the *Carter* opinion. That omission is understandable—Rule 23(b) deals with an entirely different legal situation and embodies entirely different

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[3] Contrary to petitioners' suggestion (Pb 23-24 n.3), the rejection of a stay of enlargement in favor of a "bond to keep the peace," *Sellers* v. *United States*, 89 S.Ct. 36, 39 (1968) (Black, J., Circuit Justice), is neither "inconsistent" with Rule 23 nor an example of "confusion" regarding the scope of habeas relief. This form of conditional bail release is a common form of practice in a variety of jurisdictions. See B. Gottlieb, "Public Danger as a Factor in Pretrial Release: A Comparative analysis of State Laws," National Institute of Justice, pp. 7-9. It was also a permissible option under the 1966 Bail Reform Act (18 U.S.C. § 3146(a), (b); 80 State. 214) and apparently would be allowed under current federal bail provisions. 18 U.S.C. § 3142(c)(1), (2)(N).

legal standards. It covers unsuccessful petitioners whose State convictions remain valid. Under those circumstances, continued incarceration is up to the discretion of the court.[4] *Aronson* v. *May*, 85 S.Ct. 3, 5 (1964) (Douglas, J.); *Petition of Johnson*, 72 S.Ct. 1058, 1061 (1952) (Douglas, J.); *Ostrer* v. *United States*, 584 F.2d 594, 599 (2nd Cir. 1978). The drafters of Rule 23 certainly understood this distinction and made release presumptive only in Rule 23(c) cases. Rule 23(d), which is nothing more than a rule allowing appellate review of district court orders, also should reflect what is, in essence, the widely-accepted difference between a defendant who has yet to be given a fair trial and one who is subject to a valid conviction that has not yet been tested on appeal. Compare, for instance, *N.J. Court R.* 3:26-1(a) to *N.J. Court R.* 2:9-4. If Rule 23(d) has any independent significance at all, it would arise from the support it lends to the conclusion in *Thomas*, 472 F.2d at 743, that "no change in substance was intended" when Rule 23(c) was adopted. The "special reasons" component of Rule 23(d) was not the invention of the drafters of then-Rule 49.4 of this Court; instead, it was derived from the predecessor Rule 34.3, which stated that when a prisoner obtained a writ of habeas corpus he "shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, *except where, for special reasons, sureties ought not to be required.*" (117 U.S. 708, emphasis added). The close connection between "special reasons" and the posting of sureties tends to support rather than undercut the

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[4] A similar distinction separates prisoners who succeed in obtaining a writ of habeas corpus from a third category of applicants—those who apply for release pending the disposition of their petitions for habeas relief. *Johnston* v. *Marsh*, 227 F.2d at 532 (Hastie, C.J., concurring); *Cherek* v. *United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Iuteri* v. *Nardoza*, 662 F.2d 159, 161 (2nd Cir. 1981); *In re Wainwright*, 518 F.2d 173 (5th Cir. 1975).

emphasis on the federal interest in assuring the prisoner's appearance stressed in *Carter, supra* at 995.

Perhaps sensing that their interpretation of Rule 23(c) would invest federal judges with potentially unbounded discretion, both petitioners and the Solicitor General argue that the rule should be "harmonized" with Rule 8(a) of the Federal Rules of Civil Procedure (Pb 32-33; Ab 11-12). Yet in no case has a stay of enlargement been granted because the standards relevant to Rule 8(a) have been engrafted onto Rule 23(c) or (d). In *Hill* v. *Rose, supra*, the case relied on by petitioner, the district court initially considered the question of releasing the petitioner by relying on Rule 8(a). However, in its supplemental opinion, the court decided the issue by relying on Rule 23(c), stating: "The release of a prisoner pending review of a decision ordering his or her release by writ of *habeas corpus* is governed specifically by Rule 23(c), Fed. R. App. P." 579 F.Supp. at 1091. In fact, in a footnote in the opinion, the district court expressed some irritation at the fact that this action was brought under the wrong rule. *Id.* See also, *King* v. *Zimmerman*, 632 F.Supp. 271, 278 (E.D. Pa. 1986).

Prior decisions of this Court that discuss how or whether the Federal Rules of Civil Procedure "harmonize" with habeas practice cast doubt on the propriety of petitioners' attempt to link Rule 23(c) with Rule 8(a). In *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969), this Court stated that habeas practice "is unique. [It] has conformed with civil practice only in a general sense." See also *Jago*, 570 F.2d at 620. Although federal courts may "fashion appropriate modes of procedure by analogy to existing rules . . . ," *Harris, supra* at 299, this has only been done when no other statute or habeas-specific rule is addressed to the subject, *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257, 270 (1978), and, even then, only when the rule applied is "noncontroversial." *Harris, supra* at 294 n.5. Consistent with these holdings,

the only instances in which federal courts have used Rule 8(a) to guide them in connection with Rule 23(c) or (d) proceedings concerned the question of whether motions for stays of enlargement must first be brought in the district or the circuit court. *Barnwell*, 461 F.2d at 769; *Walberg*, 776 F.2d at 135.

The nature of a habeas proceeding and the remedy it provides also give substance to this Court's belief that "specific provisions [of the civil rules] are ill-suited to the special problems and character of such proceedings." *Harris*, 394 U.S. at 296. Although habeas proceedings are characterized as "civil" for pleading purposes, "the label is gross and inexact" because "it is in such proceedings that a person in custody charges that . . . he is deprived of his freedom contrary to law."[5] *Id.* at 292-294. Such a proceeding cannot legitimately be compared with the usual civil case involving injunctions or money judgments that Rule 8(a) and (b) are designed to address. See, for instance, *United States ex. rel. Calhoun* v. *Pate*, 341 F.2d 885, 887 (7th Cir. 1965), *cert.* denied 382 U.S. 945 (1965) (inapplicability of "supersedeas bond" provisions of Rule 8 to habeas cases). Rule 8(c) itself lends support to this distinction by designating *F.R.Cr.P.* 38(a) as the exclusive source of authority for stays in criminal cases. The provisions of Rule 23(c) and (d) should be accorded similar exclusivity in habeas cases.[6]

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[5] *Grigsby* v. *Mabry*, 583 F.Supp. at 631-632, which petitioner relies on (Pb 32 n. 7), does not conflict with this holding because the opinion made it clear that since that was a capital case the defendant was not deprived "of any legally cognizable interest to be released on bond" since Arkansas law dictated that his offense was non-bailable. See also *Rice* v. *Vincent*, 486 F.2d at 216, where the defendant was under sentence for a separate murder charge.

[6] Petitioners' attempt to create a similar analogy between habeas proceedings and criminal practice by invoking the Bail Reform Act of 1984 (Pb 30-31) cannot be countenanced in the face of apparent

Support for Petitioners' open-ended and unbridled view of the scope of a federal court's discretion under Rule 23(c) and (d), then, cannot fairly be derived from the wording of the rules themselves, their contemporaneous history, or the development of caselaw since their adoption. Nor does reference to supposedly analogous federal bail provisions strengthen petitioners' arguments (see note 6, *supra*). Indeed, if the historical development of federal bail provisions informs the analysis of Rule 23 at all, it does so by strengthening the sharply-focused approach set forth in *Carter*, *supra*, rather than petitioners' theory.

Both Rule 23 and Rule 49 (now Rule 41) of this Court were adopted in 1967. At that time federal bail policy was governed by the Bail Reform Act of 1966 (18 U.S.C. § 3146; 80 Stat. 214). Consistent with this Court's holding in *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951), the main premise of that law was that in non-capital cases a person should be ordered released under minimal conditions reasonably required to do no more than assure his presence at judicial proceedings. No jurisdiction, state or federal, allowed preventive detention of unconvicted, non-capital defendants on grounds of dangerousness to the community until 1970, when the District of Columbia Court Reform and Criminal Procedure Act was passed (D.C. Code Ann.

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congressional intent to the contrary. When that Act was passed, *Fed.R.Cr.P.* 46 and *Fed.R.App.P.* 9(c) were amended to conform to its changes. Pub. L. No. 98-473, c. 207, §§ 209, 210 (Oct. 12, 1984). No similar amendment was passed for Rule 23 or Rule 41 of this Court, notwithstanding the Solicitor General's suggestion that those rules at least should be read to apply to federal prisoners seeking release under 28 U.S.C. § 2255. (Ab 13-17) Also, *Carter*, *supra* at 995, is only the latest in an unbroken line of cases that hold that federal satutory bail standards do not govern release of prisoners in habeas proceedings. See *Thomas*, 472 F.2d at 741; *Cherek*, 767 F.2d at 337; *Woodcock* v. *Donnelly*, 470 F.2d 93 at 94; *United States* v. *Dansker*, 561 F.2d 485, 486-87 (3rd Cir. 1977); *Hill* v. *Rose*, 579 F.Supp. at 1091.

§ 23-1322; 84 Stat. 570). Acceptance of petitioners' open-ended construction of Rule 23(c) by this Court, then, would be tantamount to holding that in adopting this rule, Congress intended to give federal judges in habeas cases more power to order confinement of prisoners who successfully obtained relief than was given to any other judge by any other jurisdiction in the context of bail orders for similarly situated pre-trial indictees (see Point IC, *infra*). Congress cannot possibly have intended to create such an anomalous result.

Prior to the adoption of the Bail Reform Act of 1984, federal law recognized only two situations in which bail could be denied pending trial. Both of these situations, however, represent "a 'special reason' having federal content" within the meaning of *Carter, supra* at 997. The first was the traditional exception for capital cases where "the proof is evident or the presumption great." The weight of scholarly authority, however, supports the view that denial of bail in capital cases "stemmed from concern that the defendant would flee to avoid any possibility of any death penalty and not concern that his pretrial release posed a danger to the community." *United States* v. *Melendez-Carrion*, 790 F.2d 984, 998 (2nd Cir. 1986). Simple common sense also compels recognition of the view that "few men facing the death penalty can be trusted to appear for trial." L. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 *Va.L.Rev.* 371, 377 (1970). The second situation was where bail was denied because the defendant "posed a threat to the safety and security of witnesses, *thereby hampering the operation of the court*." *United States* v. *Bigelow*,[7] 544

[7] In one case of this type, *United States* v. *Wind*, 527 F.2d 672, 675 (6th Cir. 1975), the court made a passing reference to "danger to the community" in affirming the denial of bail. The Sixth Circuit's subsequent opinion in *Bigelow*, however, made it clear that that court accepted the traditional notion that denial of bail in this situation was incident to the federal courts' responsibility to insure the integrity of the criminal justice process.

F.2d 904, 907-08 (6th Cir. 1976) (emphasis added). Case law in this area uniformly makes it clear, however, that the concern was not with a defendant's dangerousness to the community but, rather, with the "necessity of providing for the orderly progress of a criminal prosecution," *Carbo* v. *United States*, 82 S.Ct. 662, 668 (1962) (Douglas, J., Circuit Judge)—a concern having "federal content" that certainly could be cognizable under *Carter, supra*.[8] See also *United States* v. *Leisure*, 710 F.2d 422, 426 (8th Cir. 1983); *United States* v. *Graewe*, 689 F.2d 54, 57 (6th Cir. 1982); *United States* v. *Provenzano*, 578 F.Supp. 119, 120 (E.D. La. 1983), aff'd 747 F.2d 1462 (5th Cir. 1983).

In summary, respondent asserts that nothing in the language of Rule 23(c) itself, its historical antecedents, or the caselaw that construes it or even is relevant to it supports petitioners' claim that the discretion afforded to federal judges under this rule is so broad as to encompass any conceivable factor, regardless of whether or not it has federal content. Nothing in the rule itself or its history and development cast the slightest doubt on the holding in *Carter, supra* at 997, that any factor cognizable under Rule 23(c) must have "relevance to the federal function in habeas cases" and, in particular, those "which bear on guaranteeing the future presence of the petitioner. . . ."

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[8] Refusing to allow enlargement of a prisoner who obtains habeas relief because of a perceived threat to witnesses in a *state* court hearing would not be a permissible factor under Rule 23(c), however, because protection of the integrity of state court proceedings must be viewed as an area that best can be handled by the State courts, which are assumed to be able to adequately protect their own interests. *Carter, supra* at 996. See Point IB, *infra*.

B. Principles Of Federalism And Comity Require That Discretion To Stay Enlargement Of A Prisoner Pursuant To Rule 23(c) Be Limited To Factors That Are Central To The Federal Role In Habeas Proceedings And Not Include Matters That Are Traditionally Reserved To State Authorities To Decide.

In Point IB of their brief, petitioners attempt to buttress their interpretation of Rule 23(c) by invocation of the "panoply of significant state interests that this Court has suggested must be weighed" when the federal courts consider habeas applications (Pb 24). They argue that their right to appeal the judgment granting respondent a writ of habeas corpus might be "extinguished" because in order "possibly" to avoid releasing respondent or other successful habeas applicants "even though [they] may have posed a danger to the community and the state likely would prevail on appeal" they would have to initiate retrial proceedings before the writ became final, thus rendering their appeal moot (Pb 25 to Pb 27). They further claim that protection of a right to appeal that is not "diminished" by concerns regarding whether or not prisoners will remain in custody is part of the "deference for state courts" that has been a recurrent theme in this Court's treatment of habeas cases (Pb 28-29). Respondent submits, however, that acceptance of petitioners' theory would subvert rather than further the interests of federalism and comity to which this Court has always been sensitive. Rather than allow federal courts to refrain from interfering with matters traditionally and properly reserved for action by states themselves, petitioners' construction of Rule 23(c) would require federal courts to make decisions that would, in effect, supplant state criminal justice processes—indeed, would require federal courts to make judgments that would be contrary to the constitutional and statutory law of over half of the very states whose "vital interests" petitioners purport to defend. Furthermore, petitioners' construction of the rule is based on a

"Hobson's choice" that either does not exist or has nothing to do with whether or not a victorious prisoner remains in custody after a writ of habeas corpus is granted. Simply stated, whether or not the State appeals or decides to retry the prisoner ordinarily will not determine whether or not that supposedly dangerous prisoner remains in custody pending completion of whichever course the State chooses.

Respondent, of course, has no quarrel with petitioners' assertion that this Court's habeas decisions are marked by "deference for state courts" and "state court decisions" (Pb 28). Respondent vigorously disagrees, however, that this Court's deference to principles of federalism and comity takes the form of allowing federal courts to "vindicate" state interests by enforcing state law policies themselves. Instead, the common denominators of this Court's approach to federalism have been to give state governments the opportunity and authority to vindicate their "vital interests" in their *own* court systems and to require federal courts to refrain from making decisions that either have been made or best can be made under state law.

Although this Court's decisions regarding the respect due to concepts of federalism and comity in habeas litigation cannot be divided into airtight analytical compartments, three broadly-defined categories can be discerned. The first is this Court's insistence that whenever possible, state courts should be resorted to in the first instance for the vindication of constitutional rights and liberties. The most venerable example of this category of cases is the exhaustion doctrine, which requires as a matter of comity that federal courts should not consider a claim in a habeas petition until after the state courts have had an opportunity to act on it. This doctrine was first enunciated in *Ex parte Royall*, 117 U.S. 241, 251 (1886), in which this Court ruled "that the public good requires that those relations

[between state and federal courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." In *Rose* v. *Lundy*, 455 U.S. 509, 514 (1982), this Court adopted a "total exhaustion" rule for issues raised in habeas corpus petitions "because it gives the state courts the first opportunity to correct federal constitutional errors and minimize federal interference and disruption of state judicial proceedings." Closely related is the doctrine of "procedural default," which requires federal courts to refuse to consider habeas petitions when exhaustion of constitutional claims in state courts has not occurred because the prisoner has failed to raise them in the manner required by state procedural rules. *Wainwright* v. *Sykes*, 433 U.S. at 87. This doctrine was deemed necessary because the "costs" of such a default are "particularly high" given the fact that "the trial court has had no opportunity to correct the [constitutional] defect" and the "state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). See also *Murray* v. *Carrier*, 477 U.S. ___, 106 S.Ct. 2644, 2647 (1986); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 441-442 (3rd Cir. 1982). It is significant that the "procedural default" doctrine does not require federal courts to "vindicate" or enforce state procedural rules simply because those rules exist; rather, the deference allowed to state courts to make their own decisions on how and when a constitutional claim will be raised is so great that federal courts will entertain any claim that was exhausted in the state courts even if those courts could have chosen to bar consideration of it. *Engle*, 456 U.S. at 135 n.44; *County Court of Ulster* v. *Allen*, 442 U.S. 140, 154 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975).

The second category is deference that federal courts give to actions taken on decisions made by state courts

that fall squarely within the realm of state law. The foremost example of this category is the doctrine of abstention, which requires federal courts to stay their hand when granting relief would interfere with ongoing state criminal proceedings. This doctrine was fashioned so that "full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in state proceedings." *Fay* v. *Noia*, 372 U.S. 391, 419 (1963). Another example is this Court's enforcement of 28 U.S.C. § 2254(d), which requires that a presumption of correctness be given to a state court's determination of a factual issue. This Court has construed this statute strictly in order "to minimize that inevitable friction [between state and federal courts in habeas proceedings]." *Sumner* v. *Mata*, 449 U.S. 539, 550 (1981). Although not peculiar to habeas cases, the "adequate and independent state ground" doctrine falls into this category because it renders a state decision resting on an adequate foundation of state substantive or procedural law immune from federal court review. *Wainwright* v. *Sykes*, 433 U.S. at 81. The reason for this limitation on federal appellate review "is found in the partitioning of power between the state and federal judicial systems. . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

The third category is the deference that federal courts have shown to state courts to fashion their own remedies for the correction of constitutional violations that have led to the granting of writs of habeas corpus. The very reason for the granting of a conditional writ is that federal courts can only adjudge whether or not constitutional rights have been violated in such a way as to render a prisoner's conviction and confinement unconstitutional. This power does not extend so far as to allow a federal court to dictate the manner by which a state must correct the constitu-

tional infirmity. *Cabana* v. *Bullock*, 474 U.S. ___, 106 S.Ct. 689 (1986); *Irvin* v. *Dowd*, 366 U.S. 717, 728-729 (1961); *Magwood* v. *Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). See also *Thomas*, 472 F.2d at 743-744; *Jago*, 570 F.2d at 623.

The common thread that binds the various categories of concern for interests of federalism and comity together is clear—the notion that the power possessed by federal courts in habeas matters should not be exercised in a manner that frustrates or conflicts with the state court's ability to "vindicate vital state interests" *themselves*. Far from being "inconsistent with the deference to state court decisions that have shaped the developing contours of habeas corpus jurisprudence" (Pb 28), the holding in *Carter, supra* at 997, is perfectly "consistent with federalism and comity concerns" because it reads Rules 23(c) to exclude factors that are "peculiarly within the authority of the state to recognize and act upon." It is the petitioners' own theory of the scope of Rule 23(c) that is inconsistent with the true meaning of federalism in every respect. First, the theory invokes "deference" for the wrong type of state action. Petitioners are not asking for deference either to "state courts" or to "state decisions"; instead, they want deference to be accorded to the state's interest as an *adversary party* in habeas litigation. Petitioners have produced neither precedent nor compelling reasons why their interest in appealing a judgment that a particular trial did not measure up to settled notions of constitutional law and fundamental fairness should be placed in the same category as state law and procedures created by litigation-neutral authorities such as state courts and legislatures. More to the point, petitioners are asking not that state court judgments or processes be shown deference but, rather, that state prosecutors not have to resort to state courts *at all* to "vindicate" the "vital state interests" of protecting the community from allegedly dan-

gerous defendants. This is all that *Carter, supra* at 998, requires them to do. To allow concern for "vital state interests" to be converted from a shield protecting orderly state criminal justice processes into a sword against successful habeas applicants to be wielded by federal judges at a prosecutor's request at best fails to show honor or respect, much less "deference," to the traditional concepts of federalism and comity.

Petitioners' request that federal courts consider dangerousness as a factor in Rule 23(c) proceedings also conflicts with the ideal of federalism because it asks enforcement by federal judges of a so-called "vital state interest" that New Jersey and many other states refuse to allow their own courts to "vindicate" in cases involving pre-trial indictees, whose situation is similar to that of respondent (see Point IC, *infra.*) It is at best ironic that petitioners wish to have respondent confined by a district court judge pending appeal of the judgment entered below because of alleged dangerousness when they would be constitutionally disentitled to ask a judge of the Superior Court of New Jersey, Law Division, to order pre-trial confinement on the very same basis. *N.J. Const.*, Article I, par. 11; *State* v. *Johnson*, 61 N.J. 351, 360, 294 A.2d 245 (1972). Nor would the situation be different in any of the seventeen other states whose constitutions or statutes do not allow their judges to consider dangerousness to the community as a factor in pre-trial release. Gottlieb, "Public Danger as a Factor in Pretrial Release," *supra* at pages 11, 25. Nor, in theory at least, would the probable result be different in any of the eight other states which allow judges to consider the safety of the community in fashioning pre-trial release conditions but do not allow preventive detention of the defendant. *Id.* at pages 9-12. The remaining twenty-six state and federal jurisdictions that do allow pre-trial preventive detention offer a myriad if not bewildering array of systems for determining the definition of "dangerousness," defining the type and stan-

dards of proof for establishing it, establishing procedural requirements and hearings at which the issue can be resolved, and limiting the length of the period of detention. *Id.* at pages 13-16. See also J. Goldkamp, "Danger and Detention: A Second Generation of Bail Reform," 76 *Journal of Criminal Law and Criminology* 1, 15-28 (1986); Annotation, "Pretrial Preventive Detention by State Court," 75 A.L.R. 3d 956 (1977 and 1986 supp.). In order to conform with petitioners' theory regarding the scope of Rule 23(c), then, in half of the states a federal judge would have to order preventive detention of a state prisoner in defiance of the law of the very jurisdiction in which the prisoner was convicted. In the other half of the states, a federal judge might find himself in a position either of applying or construing state law, which this Court does not favor, *Mullaney* v. *Wilbur*, 421 U.S. 684, 690-91 (1975), or would have to ignore state law and create his or her own variety of preventive detention out of mere "broad discretion." To call such results "deference to state courts" is a grim joke.

A doctrine of preventive pre-trial detention that has found favor with only half of the states cannot be raised to the category of a "vital state interest" that this Court has shown deference to under the mantle of federalism and comity. Even if protection of the community is recognized as a vital state interest, however, the extreme variations in the states' treatment of that interest in the context of release of unconvicted defendants lends credence to the holding in *Carter*, *supra* at 996, that "the determination of 'dangerousness' can only be made by the state in accordance with state procedures."[9] Recognition of the wisdom

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[9] An interesting and ironic example of the propriety of the *Carter* holding is *Taylor* v. *Redman*, 500 F.Supp. at 459, which petitioners claim is contrary to *Carter*. In that case, the district court considered the state's claim that the defendant was dangerous, but rejected it in

of this holding by this Court would do nothing more than reaffirm earlier holdings that some determinations "are as much as matter of allocation as [they are] of analysis," *Miller* v. *Fenton*, 106 S.Ct. at 451-452, and that an important function of habeas corpus is "allowing the State to deal with these peculiarly local problems on its own." *Preiser* v. *Rodriguez*, 411 U.S. at 498.

Even if "the state's right to unfettered appellate review" is entitled to be noticed by this Court, petitioner's argument that dangerousness to the community should be a factor under Rule 23(c) fails to persuade because the supposed threat to their interest that they claim *Carter* represents simply does not exist. Petitioners posit a "Hobson's choice" between continuing their appeal and allowing the prisoner's release "even though he may have posed a danger to the community. . . ." or going to trial. (Pb 26-27) This "Hobson's choice" is a false one because the law is clear that taking the prisoner to trial will not ensure that the state will be able to keep him in custody, nor will continuation of the appeal of the granting of the writ inevitably mean that the prisoner will be released. Consistent with principles of federalism and comity, the question of continuation of custody under either scenario will depend on the law of the state involved. See *McGee* v. *Alaska*, 463 U.S. 1339 (1983) (Rehnquist, J., Circuit Justice).

Petitioners opine that abandonment of their appeal and initiation of a retrial will be necessary "in order to possibly retain respondent in custody. . . ." (Pb 27) The key

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part because the *state* courts had found "that Taylor was no longer a threat to society and was therefore entitled to be released . . ." This is much more clearly an example of "a matter traditionally reserved to the state authorities to decide," *Carter, supra* at 996, then it is an example of a federal court using dangerousness as a factor under Rule 23(c).

word in this formulation is "possibly," because it bespeaks recognition of the fact that exercise of the retrial option does not guarantee that the state will be able to keep the prisoner in custody. Taking the prisoner to trial would mean subjecting him to whatever rules that the states courts have established for pre-trial bail. In New Jersey, as in twenty-five other states, continued custody of the prisoner, then, will depend on the establishment of conditions that will reasonably assure his or her appearance at trial and nothing more. *Fisher* v. *Rose*, 757 F.2d 789, 791 (6th Cir. 1985); *Gaiten* v. *Stahl*, 337 F.Supp. 1044, 2045 (W.D.N.C. 1972). Unless the prisoner is unable to post even the minimum bond necessary to assure his appearance, he will be released pending retrial, as respondent himself was during most of the period between his arrest and original trial. Similarly, even if the *Carter* holding applies, a successful habeas prisoner can be held during the pendency of the State's appeal[10] in the circuit court if he faces retrial in a state which allows pretrial preventive detention unless, of course, such detention is subject to attack on other constitutional grounds. *Carter, supra* at 998. See also *United States* v. *Salerno*, 794 F.2d 64, 71-72 (2nd Cir. 1986), *cert.* granted ___ U.S. ___ (1986); *Melendez-Carrion*, 790 F.2d at 1005-1009 (Feinberg, C.J., concurring). *Fisher* v. *Rose*, 757 F.2d at 791-792. Either way, nothing "prevents the State from dealing with a habeas releasee who will be retried as the State would deal with any other State prisoner who has yet to stand trial." *Carter, supra* at 998.

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[10] It should also be noted that the passage of the period during which the writ is conditional without initiation of retrial or other proceedings by the state because of its decision to proceed with an appeal from the granting of the writ does not bar the state from reprosecuting the defendant after the appeal has run its course. *Fisher* v. *Rose*, 757 F.2d at 791; *United States ex rel. Brown* v. *Rundle*, 427 F.2d 223, 224 (3rd Cir. 1970); *Latzer* v. *Abrams*, 615 F.Supp. 1226, 1227-1228 (E.D.N.Y. 1985).

It would appear that petitioners' "repugnant" choice has considerably less to do with *Carter, supra* or with Rule 23(c) at all as it has to do with the practice of "conditional writs" itself. It is certainly true that if the state elects to retry a prisoner or otherwise correct the constitutional defect that rendered the state court proceedings unfair, an appeal from the granting of the writ cannot proceed. *Pitchess* v. *Davis*, 421 U.S. 482, 490 (1975); *Johnson* v. *Smith*, 764 F.2d 114, 115 (2nd Cir. 1985); *Galloway* v. *Stephenson*, 510 F.Supp. 840, 845-846 (M.D.N.C. 1981). Respondent would submit, however, that the state's quandry in this regard is based not on the question of a prisoner's continued custody but, rather, on whether or not the state can "go to retrial without the benefit of evidence which a district court has ruled inadmissible on fourth, fifth, or sixth amendment grounds. . . ." (Pb 25-26) The vast majority of habeas cases simply do not present "difficult or unsettled" or even novel constitutional claims (Pb 29). Where they do the potential impact on the docket of habeas courts themselves will be a sufficient federal interest to justify a stay of the judgment, particularly in cases where a prisoner's continued custody is a foregone conclusion anyway. *Grigsby* v. *Mabry*, 583 F.Supp at 631-632. In the run-of-the-mill habeas case, however, the issue invariably can be reduced to applying settled constitutional law to the peculiar facts of a particular trial. That is certainly the case in the instant matter. *Braunskill* v. *Hilton*, 629 F.Supp. 511, 521-526 (D.N.J. 1986), aff'd ___ F.2d ___ (3rd Cir. 1986) (App. 17-26). The "Hobson's choice" of appeal or retrial, then, is basically a strategic decision by the state based on whether or not the prosecution can prove its case without the evidence that has been suppressed or, even if it can, whether the basis of its appeal is strong enough to risk putting off a retrial until an appellate court has clarified the situation. While this may represent a "difficult choice

of remedies" (Pb 29), it is no more unfair or improper than any of the delicate choices that defendants face every day in the criminal justice system and that this Court has declared to be constitutional. *Corbitt* v. *New Jersey*, 439 U.S. 212 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Indeed, the state's purported "Hobson's choice" is considerably less unfair than those that defendants face because the State has vastly more resources and time to devote to its decision than any defendant, regardless of his or her means. *Benton* v. *Maryland*, 395 U.S. 784, 796 (1969).

Regardless of the sincerity of petitioners' concerns regarding public safety, there is no lack of "fundamental fairness to the state and the general public" (Pb 30) in refusing to allow federal courts to do to successful habeas applicants under the guise of Rule 23(c) or (d) what the constitutions, legislatures, and voters of New Jersey and other states refuse to allow their own courts to do when petitioners or other law enforcement authorities raise the specter of dangerousness to the community with regard to similarly situated pre-trial indictees. And it surely is not fundamentally unfair to refuse to allow petitioners to use a wholly-invented "Hobson's choice" regarding its right to appeal to turn settled concepts of federalism and comity on their heads. The holding of *Carter*, *supra*, represents a far more satisfactory accommodation of the concerns of federalism and comity because it holds not that dangerousness concerns are unimportant but, rather, that the "State has simply chosen the wrong forum in which to present an application based on the traditional state concerns of dangerousness, and has provided no authority for extending federal power into such an area." *Id.* at 998 n. 6. A court as concerned with the interests of federalism as this Court surely is will not allow petitioners to use the limited discretion provided to federal courts under Rule 23(c) as a means of protecting themselves from the laws of their own state.

C. Respondents' Legal Status As A Defendant Who Has Been Indicted But Not Convicted Of A Crime Precludes Granting A Stay Of His Enlargement Based On Alleged Dangerousness To The Community In The Absence of Specific Authorization In Rule 23(c) Or An Equivalent Statute Or Rule.

In Point II of their brief, petitioners argue that granting a stay of the enlargement of a successful habeas applicant either is a "justifiable continuation of punishment" or is a permissible means of furthering a valid state objective other than punishment (Pb 37-38). Either of these positions hinge directly on rejection by both petitioners and the Solicitor General of the holding in *Carter, supra* at 998, that the position of a habeas releasee is the same as "any other State prisoner who has yet to stand trial" because it is the releasee's "*conviction*, not his *indictment*, which has been declared unconstitutional by the federal court" (emphasis in original). Petitioners' assumption that respondent is not in the same legal position as a pre-trial defendant is without foundation in law. Once it is recognized that a prisoner who obtains a writ of habeas corpus is legally in the position of an unconvicted defendant, petitioners' various justifications for "continuing" his "punishment" based on considerations of dangerousness vanish because they all depend on caselaw that applies solely to prisoners with valid state convictions or derive from specific state or federal statutes permitting detention to be based on predictions of dangerousness.

Both petitioners' and the Solicitor General's briefs are festooned with statements to the effect that a state court judgment of conviction from which a prisoner has obtained relief by obtaining a writ of habeas corpus is entitled to "respect" or "deference" because the grant of the writ only "casts doubt upon [its] validity" or only identifies a "flaw" or "infirmity" in the judgment (Pb 31 n. 6, 36, 37, 40; Ab 9, 13). Such statements seem to harken back to a time long past when the writ of habeas corpus

was available only to test the jurisdiction, in a narrow sense, of the committing court. *Frank* v. *Mangum*, 237 U.S. 309 (1915). It is now firmly established, however, that the central and unquestioned purpose of the Great Writ is to allow a court of competent jurisdiction to determine whether a conviction is invalid because it was obtained in violation of the constitutional requirement of due process of law. "[W]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial . . ." *Id.* at 346-347 (Holmes, J., dissenting). See also *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Fay* v. *Noia*, 372 U.S. at 402, 409. A conviction obtained in violation of due process of law is not "valid" for any purpose; it "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex parte Siebold*, 100 U.S. 371, 376-377 (1879). The fact that a conviction is nullified in this manner by "a single district court judge" (Pb 29) is of no consequence given the fact that in several periods of our history the power and authority of lower federal courts in habeas cases was greater even than that possessed by this Court on appeal. See *Ex parte Watkins*, 3 Pet. (28 U.S.) 193 (1830), as discussed in *Fay* v. *Noia*, 372 U.S. at 407. Proof that a conviction found to be in violation of due process is null and void for any purpose also can be inferred from the substantial body of law that holds that a writ of habeas corpus affects collateral consequences of a conviction apart from custody itself. *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968); *Mizell* v. *Attorney General of New York*, 586 F.2d 942, 948 (2nd Cir. 1978), *cert.* den. 440 U.S. 967 (1979). At minimum, such a conviction cannot be used to justify "continuation of punishment"; even cases relied upon by petitioners stress that "a detainee may not be punished prior to *an adjudication of guilt in accordance with due process of law.*" *Bell* v. *Wolfish*, 441 U.S. 520, 536

(1979) (emphasis added); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-166 (1963). Any claim that a conviction found to be unconstitutional by a district court in a habeas proceeding is "entitled to deference" (Ab 13) has a particularly hollow ring in the case at bar, where both the district and circuit courts have held that due process was violated because respondent was denied his Sixth Amendment right to have the jury consider probative evidence that he was not guilty of the charge against him. See App. 17-26 and 35-36.

Respondent recognizes that his position is not perfectly identical to that of a pre-trial indictee only because "the district court's finding is the subject of appellate review and may well be reversed." (Pb 40) Until this possibility occurs, however, this is a distinction without a difference. Relevant caselaw uniformly holds that the mere filing of an appeal does not *per se* stay a judgment of appeal under either Rule 23(c) or Rule 8(a), upon which petitioners place misguided reliance. *Barnwell*, 461 F.2d at 679; *Jago*, 570 F.2d at 622; *Johnson* v. *Scully*, 563 F.Supp. 851, 880 (E.D.N.Y. 1983). State criminal judgments invalidated in habeas proceedings certainly are not entitled to *res judicata* effect for any purpose. *Fay* v. *Noia*, 372 U.S. at 422; *Preiser* v. *Rodriguez*, 411 U.S. at 497-498. The fact that a judgment of a district court granting a writ of habeas corpus later may be found to be erroneous does not mean that it is not final for all intents and purposes unless it is affirmed (Ab 13). *Browder* v. *Director*, 434 U.S. at 266. To claim, then, that a stay of enlargement of a prisoner who has obtained a writ of habeas corpus is appropriate because his unconstitutionally-obtained judgment of conviction is entitled to "deference" despite the fact that the district court judgment has not been disturbed in any way is simple bootstrapping.

Practical as well as legal considerations militate in favor of equating a prisoner who has obtained a writ of habeas

corpus with a defendant who has yet to stand trial. The state, of course, is not the only party to a habeas proceeding that faces the possibility of having to participate in a new trial; if, as in the case at bar, the circuit court affirms the granting of the writ and this Court does not reverse the judgment, the prisoner must prepare to have his guilt or innocence tested by a jury. As with pretrial indictees, prisoners who have been granted writs "are handicapped in consulting counsel, searching for evidence, and preparing a defense." *Stack* v. *Boyle*, 342 U.S. at 8 (Jackson, J., concurring). Detaining such a prisoner under Rule 23(c) solely because of a claim by the state that his dangerousness is established by the very judgment that has been found to be unconstitutional (Pb 40) at best adds insult to the injury described in *Stack*.

As noted consistently throughout this brief, the essential function of the Great Writ is to deliver a prisoner from custody or any other consequence of a conviction that the State has obtained in violation of fundamental constitutional law. If the prisoner's incarceration is to be continued pending appeal of the granting of the writ, it stands to reason that it should only be for reasons that complement or at least do not conflict with this essential function. These reasons by definition cannot include "continuation of punishment." The costs of such a "continuation" in terms of the efficacy of the writ itself cannot be ignored. The fact is that the legally questionable "Hobson's choice" faced by petitioners is nothing compared to the prejudice that would be suffered by respondent, who "is threatened with immediate inseparable injury in the form of continued unlawful incarceration if he is not immediately released." *Taylor* v. *Redman*, 500 F.Supp. at 460. Since respondent had served five years in prison and was going to be paroled in only seven months under his original sentence when his enlargement became effective, granting of the requested stay would have meant that in

practical terms he would have had to serve the entire custodial sentence imposed pursuant to his unconstitutionally-obtained conviction before the appeal of the district court's judgment was completed.[11] Such a result cannot lightly be countenanced. *LaFrance*, 407 F.2d at 507; *Alim* v. *Smith*, 474 F.Supp. 54, 63 (W.D.N.Y. 1979).

The cases cited by petitioners that uphold court, jury or parole board actions predicated on considerations of a defendant's dangeousness (Pb 40) do not apply legitimately to respondent and similarly situated prisoners in any way. These cases have two vital characteristics in common. First, they concern predictions about the future dangerousness of defendants who have *presently valid convictions* for an offense. This obviously contrasts with the situation of a prisoner whose conviction has been nullified by the granting of a writ of habeas corpus. Second, in these cases, as well as in *Schall* v. *Martin*, 467 U.S. 253 (1984) (upholding statute allowing detention of dangerous juveniles for a limited period prior to delinquency hearings as a legitimate exercise of the state's *parens patriae* responsibility), the detention was justified by validly enacted state statutes which were specific in their grants of authorization and which carried within them adequate procedural safeguards against erroneous

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[11] Equating a successful habeas applicant with a pretrial indictee, of course, requires recognition of the fact that the prisoner shares the disadvantages as well as the advantages that go with this status. A recipient of a writ of habeas corpus who cannot post a bail reasonably determined to be necessary to assure his or her appearance, like a pre-trial detainee in the same position, may be held for months or even years before he or she is either acquitted at trial or convicted of a lesser offense carrying a maximum sentence that is less than the time that he or she already has been held. This is theoretically, at least, not "continuation of [the prisoner's] punishment," however; it is simply the vindication of the federal interest recognized in *Carter*, *supra* at 995, even when hindsight shows that such vindication constituted an unfortunate injustice.

and unnecessary deprivations of liberty. In the case at bar, this Court is presented with nothing more than a sparsely worded rule that contains a very unspecific grant of limited discretion. It is at best improper to equate Rule 23 (c) with the detailed statutory schemes that this Court has previously approved in the face of constitutional challenges, particularly when the interests of federalism and comity are satisfied by the protection of petitioners' right to resort to far more specific state laws regarding pre-trial confinement or release in appropriate cases contained in *Carter, supra* at 997-998.

In summary, respondent submits that nothing in Rule 23(c) itself justifies the conclusion that federal judges have the discretion to deny the enlargement of a prisoner who has obtained a writ because of predictions regarding the prisoner's alleged dangerousness to the community. Indeed, the nature of habeas corpus itself and the principles of federalism and comity that are intertwined with it strongly support the propriety of the construction of Rule 23 (c) and (d) outlined in *Carter, supra*. If this Court should hold that Rule 23(c) allows for detention on the basis of dangerousness, then respondent would contend that the equivalency between his legal situation and that of a pretrial indictee renders incarceration on this basis "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *United States* v. *Salerno*, 794 F.2d at 71-72; see also *Melendez-Carrion*, 790 F.2d at 998-1004. Since this contention will no doubt be briefed, argued and discussed thoroughly by this Court in connection with the proceedings following the granting of *certiorari* in *Salerno, supra*, there is no need for respondent to elaborate on this point.

POINT II

THE CASE AT BAR IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION OF THE ISSUES RAISED BY BOTH PARTIES.

Petitioners recognize that it is "undoubtedly true" that at some point this case may become moot because "this Court's decision may not affect this particular respondent" (Pb 43). They argue, however, that even if this eventuality occurs, this Court should render an opinion in this case primarily because such an opinion may be important in future Rule 23(c) cases involving *other* defendants (Pb 47-49). Respondent contends that the "capable of repetition yet evading review" doctrine that petitioners rely upon to keep this case alive has not and cannot fairly be applied to cases that present issues that are moot as to the parties to the matter at bar but may affect situations involving the state and a third party. Even if this case does not become moot during the course of these proceedings, this Court should dismiss the writ of *certiorari* as improvidently granted because the orders entered below denying the motion for stay or revocation of respondents' enlargement turned primarily on this case's individual facts rather than on the legal reasoning that may or may not distinguish the holding in *Carter*, *supra*, from other cases.

The Third Circuit Court of Appeals affirmed the order granting respondent a writ of habeas corpus on December 2, 1986. Petitioner's motion for rehearing pursuant to *Fed. R. App. P.* 40(a) was filed on or about December 15, 1986. If that motion is denied, then petitioners would have at most ninety days from the date of the order to petition for *certiorari* in this Court, and respondent would have thirty days from his receipt of the petition to file his brief in opposition. See Rules 20.4 and 22.1 of this Court. Since this Court will undoubtedly rule on the petition before the end of this Term, it is highly possible, if not quite likely,

that the petition for *certiorari* on the merits of the granting of the writ could be denied before this Court has rendered an opinion in the instant matter. If this occurs, then the issue in this case is obviously moot because the appeal of the merits that is the necessary predicate for stay action under Rule 23(c) would be at an end.

In *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975), this Court held that the "capable of repetition yet evading review" doctrine was limited to cases in which "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the *same action* again" (emphasis added). Regardless of the merits of petitioners' arguments concerning the first prong of this test (Pb 45-47), they cannot possibly satisfy the second prong by showing only that this Court's ruling can affect future disputes with defendants not parties to this case. In *Weinstein*, *supra* at 148, this Court ruled that Bradford's attack on the constitutionality of parole release procedures in North Carolina became moot when he was granted parole. The opinion makes it clear that the "same party" in the "same action" referred to the litigant claiming injury by state action and not to the state itself when it stated that "respondent, who challenged the 'governmental action or policy' in question, no longer has any present interest affected by that policy." The necessary inference from this language was made clear in *Lane* v. *Williams*, 455 U.S. 624, 634 (1982), where this Court ruled that the "possibility that other persons may litigate a similar claim does not save this case from mootness." Whether or not petitioners are "susceptible to future injury" because "the same circumstances will occur repeatedly" in unrelated cases, then, is not a cognizable factor for purposes of the "capable of repetition yet evading review" doctrine. If it should occur that a petition for *certiorari* on the merits of

this case is denied prior to the issuance of an opinion in this matter, any such order should be accompanied by a separate order dismissing this case as moot.

Even if this case does not become moot prior to the issuance of an opinion by this Court, repondent submits that the background of this matter strongly points to the conclusion that on its facts this case is not an appropriate vehicle for this Court's examination of the proper construction of Rule 23(c). In an interlocutory matter of this sort, the petitioners should have the burden of showing (or, at least, the evidence when fairly viewed should disclose) that the result below might be different if their interpretation of Rule 23(c) and (d) were adopted by this Court and the case was remanded for further proceedings. "We do not suggest that district courts should grant even brief 'turn-around' stays when appeals are frivolous, or when justice requires that no further delay take place." *LaFrance* v. *Bohlinger*, 487 F.2d at 508. Petitioners simply have failed to show that they will prevail below even if the very factors they rely on are applied to the case.

In Point IC of their brief, petitioners argue that they were not given a proper opportunity to present their claims regarding respondent's alleged dangerousness because the district court refused to consider it as an independent factor under Rule 23(c). Such an argument sidesteps the fact that although the district court recognized that its discretion to grant or deny the stay was defined by *Carter, supra*, it gave the state a full and fair opportunity to substantiate its claim that defendant was a danger to the community (JA 11; Tr 5-13 to 21). Although defendant had pled guilty and served almost all of his sentence on an unrelated conviction for third-degree burglary and theft before the stay hearing was held, the Deputy Attorney General never even mentioned this to the district court. Instead, he initially pointed to respondent's alleged "long prior record" as support for its claim

(JA 9; Tr 2-22 to 23). After closer inspection of respondent's presentence report, however, the Deputy Attorney General had to admit that "I was in error by making that statement" because his offense history only disclosed a prior adult disorderly persons conviction (the equivalent of a non-indictable common-law misdemeanor) in 1979 and a juvenile complaint for robbery that had been dismissed in 1976. (JA 12-13; Tr 5-22 to 7-21) He then argued that "the facts of this particular case substantiate [that respondent] committed a very serious crime. On that basis, his dangerousness is established . . ." (JA 13-14; Tr 7-22 to 8-5) Although it did not address this point specifically, the district court obviously rejected it as a basis for granting a stay, as well it should have. *Cagle* v. *Davis*, 520 F.Supp. at 312 (fact that petitioner may have to be retired on a capital offense does not justify a stay of enlargement *per se*). See also *Barnwell* v. *Rundle*, 461 F.2d at 770. Thus, it is apparent that the record below is devoid of any credible evidence that respondent's enlargement conceivably places the community at risk and a remand for consideration of that factor would inevitably result in denial of petitioners' motion for revocation on that basis.

A similar conclusion must be reached regarding any claim based upon petitioners' chances of success in the appeal of the district court's order granting respondent's petition for a writ of habeas corpus. The opinions of the district court and the circuit court below themselves rebut the notion that petitioners have a "great" chance of reversal on appeal far more eloquently than respondent's attorney can. In brief, respondent was denied the opportunity to call his sole alibi witness in his defense because his attorney filed the notice of alibi out of time. He was precluded from calling the witness even though the prosecutor knew the witness' identity and had actually interviewed the witness a week prior to trial. Significantly, on appeal in the Third Circuit, petitioners did not contest the

district court's ruling that respondent's Sixth Amendment right to call witnesses on his behalf was violated; instead, they only took issue with the ruling that this error was not harmless beyond a reasonable doubt, notwithstanding the fact that it took the jury two and a half days to reach a verdict in a case that took only one day to try.

Respondent respectfully submits that his prediction in his brief in opposition to the petition for the writ of *certiorari* (page 6) that petitioners' chances of success on appeal were "minimal to non-existent" has been fully borne out as of the date of this writing. Furthermore, the opinion of the Third Circuit does not support any claim that petitioners will be successful in obtaining a writ of *certiorari* in this Court, much less that this Court will see fit to reverse the lower court's judgment. As noted previously, petitioners' principal claim on appeal was that the violation of respondent's Sixth Amendment right to present witnesses on his behalf was harmless beyond a reasonable doubt.[12] The circuit court found that this claim had to fail under the test set forth in *Chapman* v. *California*, 386 U.S. 18 (1967), which both parties agreed was the appropriate yardstick for measuring petitioners' arguments. In so doing, the circuit court relied heavily on the peculiar facts of this case. (App. 35-36) This alone suggests that this Court is unlikely to exercise its *certiorari* discretion in petitioners' favor.

In sum, respondent contends that the foregoing facts do not support petitioners' claim that the courts below

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[12] Petitioners also claimed that respondent's habeas petition was barred by the doctrine of "procedural default" under *Wainwright* v. *Skyes*, *supra*, and its progeny. This claim was thoroughly reviewed and rejected by the circuit court, primarily because petitioners had waived their right to raise it on appeal in the first place (App. 32-35). See *Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981).

blindly followed *Carter* when they denied the motion for a stay or revocation of respondent's enlargement. As noted in respondent's brief in opposition to the petition for a writ of *certiorari* (page 6), petitioners' brief in the Third Circuit in support of the motion for stay or revocation of enlargement both attacked the holding in *Carter, supra*, and sought to persuade the court that its request was justified under the caselaw relevant to Rule 8(a) motions. The Third Circuit denied the motion on May 27, 1986, without even waiting for respondent to file a brief in response (JA 21-22). In so doing, the court acted with full cognizance of the certified record possessed by this Court. The dispatch with which petitioners' motion was rejected strongly suggests that the refusal to grant *en banc* consideration was motivated more by the Third Circuit's belief that this case was an unsuitable vehicle for examination of the *Carter* holding than by mere adherence to the holding or reasoning behind the opinion itself. Any such conclusion by the circuit court is nearly compelled by the instant record and should form the basis *per se* for dismissal of the writ of *certiorari* as improvidently granted.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the United States Court of Appeals for the Third Circuit be affirmed or, in the alternative, that *certiorari* be dismissed.

Respectfully Submitted,

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Date: January 2, 1987

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT,
D. NEW JERSEY

DANA BRAUNSKILL, *Petitioner*,

v.

GARY HILTON, Superintendant, New Jersey State Prison, Trenton, New Jersey and Irwin I. Kimmelman, Attorney General of New Jersey, *Respondents*.

Civ. A. No. 85-2008.*

FEB. 27, 1986

OPINION

HAROLD A. ACKERMAN, DISTRICT JUDGE.

Petitioner Dana Braunskill, presently confined at New Jersey State Prison in Trenton, brings this *pro se* petition for habeas corpus under 28 U.S.C. § 2254. The issue in this case is whether it is constitutionally permissible in a state criminal prosecution for the trial judge to refuse to permit an alibi witness to testify solely because defense counsel did not respond to the state's discovery request within the time required by the state's notice of alibi rule. I hold that under the circumstances of this case, in agreement with Judge Stern in

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* This opinion is published at 629 F.Supp. 511 (D.N.J. 1986). The opinion was inadvertently deleted from the joint appendix and is reproduced herein for the convenience of the parties and this Court.

Hackett v. *Mulcahy*, 493 F.Supp. 1329 (D.N.J. 1980), that petitioner's sixth amendment right to call witnesses in his defense outweighs the state's interest in enforcing its notice of alibi rule and that the preclusion sanction violated petitioner's sixth amendment right. Therefore, the petition for habeas corpus relief will be granted.

On January 30, 1981, petitioner was convicted in the Superior Court, Law Division, Essex County, New Jersey, of first degree sexual assault in violation of N.J.S.A. 2C:14-2, and fourth degree unlawful possession of a knife contrary to N.J.S.A. 2C:39-5(d). On March 26, 1981, petitioner received sentence for aggravated sexual assault charge, to run concurrently with an eighteen month sentence for the weapons charge. The Appellate Division affirmed the conviction on December 14, 1982, and the Supreme Court of New Jersey denied certification on March 2, 1983. Petitioner filed this habeas corpus application on April 26, 1985. He alleges denial of his right to call witnesses in his defense, ineffective assistance of counsel, and improper reference to his criminal history in violation of his constitutional rights.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 12, 1980, Jane Lyons, a sixty-nine year old woman, exited a bus and entered the lobby of her apartment building, the Troy Towers, in Bloomfield, between 12:15 and 12:30 a.m. She obtained her mail from her mailbox in the rear of the lobby, and as she turned to walk toward the elevator, she felt an arm around her throat. Ms. Lyons told her assailant to take her money but he did not; rather, he struggled with her until he got her down on the floor. The assailant then opened his trousers and exposed himself and told Ms. Lyons that if she followed his orders, he would not hurt her. He was holding a knife near her throat which the victim attempted to push away; in so doing she cut her hands severely. Her assailant then forced her to perform fellatio on him. During this incident Ms. Lyons heard someone enter the lobby and heard a voice, but she was unable to view the person because she was facing a wall. Shortly

thereafter, the assailant left. Ms. Lyons entered the elevator and went to a neighbor's apartment, where she summoned the police.

Officer Michael Sailer of the Bloomfield Police Department was on routine vehicle patrol on June 2, 1980, when he received a radio report that an assault had occurred in the Troy Towers. Sailer and his partner proceeded to the apartment building and searched the lobby, where they found blood smeared on the floor in the vicinity of the elevator. The officer observed that the elevator control dial indicated that the elevator was on the sixth floor, so he and his partner ascended to that floor to search for the victim. The officers found Ms. Lyons, who was extremely upset and bleeding profusely from her wounds. The officers transported the victim to a local hospital for treatment.

Ms. Lyons was unable to get a good look at the face of her attacker. She told Officer Sailer that her assailant was black, between 5'6" and 5'9" in height, of medium build, and was wearing dark clothes and a jacket.

The defendant was identified by two witnesses. Both of these witnesses testified that the lighting conditions in the lobby where the incident occurred were very good. Josette Amabile, who also resided in Troy Towers testified that she entered the lobby shortly after midnight to retrieve her mail. She said she saw an elderly white woman against a wall on her knees and a black male who appeared to be seated or squatting. Ms. Amabile testified that she had direct eye contact with the male for approximately five seconds, at which time he groaned and covered his face with his hand. Ms. Amabile realized that something was wrong, and she ran back to the elevator.

Joseph Scherer, also a resident of Troy Towers, stated that he entered the lobby shortly after midnight. He noticed a commotion near the elevator and observed a black man whom he identified as the defendant struggling with a white woman. Mr. Scherer picked up a heavy ashtray and was about to strike the man when the assailant told Mr. Sherer to leave or he would kill the victim. Mr. Scherer left and telephoned the police.

Detective Donald Peters of the Bloomfield Police responded to the crime scene at 4:30 a.m. on the morning of June 12, 1980, and interviewed Mrs. Amabile. The detective showed the witness six photographs, and she identified the defendant as the assailant. At 6:00 p.m. on the same date (eighteen hours after the attack), the detective interviewed the victim, but she was only able to give him a general description of her attacker and was unable to make a photographic identification. Ms. Lyons nevertheless testified on cross-examination that she believed the defendant was the man who attacked her. Detective Peters showed the victim defendant's photograph because Peters had previously been involved in investigations concerning sexual crimes. At approximately 8:00 p.m. on the same date, Peters interviewed Joseph Scherer. Peters showed the witness the same photo spread he had earlier shown to Amabile, and Scherer also identified defendant as the assailant.

Detective Michael Sisco, who knew petitioner prior to June 11, 1980, testified that he saw him in the dark clothing walking around Bloomfield in the direction of the Troy Towers Building, between 10:15 and 10:30 p.m. on the night in question. Detective Peters testified that he also saw Braunskill at around 11:30 that evening when he was patrolling in an unmarked vehicle. Detective Peters stated that he saw other black males dressed in dark clothing walking around Bloomfield that night, but admitted that none of these individuals were depicted in the photos shown to Ms. Lyons or other witnesses.

Dana Braunskill testified that he was not in Troy Towers that evening, contending that it was a case of mistaken identification. He testified that he was not wearing dark clothing on that night. The victim, who had described her assailant's clothing as dark, saw the assailant in a well-lit lobby. Defendant testified that several hours prior to midnight he visited a couple of bars and diners in Bloomfield and Orange. Except for a ride by an acquaintance from the Sixty-Five Club on Washington Street in Bloomfield to the Halftime Emporium on Broad Street in that city, defendant walked from place to place. In the course of the evening, defendant walked across the street from an under-

pass which leads to the Troy Towers parking lot. He further testified that he arrived at the apartment of his girlfriend, Florine Moore, with whom he was living at the time, shortly after 11:30 p.m. He stated that Ms. Moore was on the telephone when he came into the apartment. Defendant further testified that after his arrival at Ms. Moore's apartment at 219 Park Place in Orange, he did not go out again.

Petitioner also related that on a number of occasions in the past he had been stopped by Detectives Peters and Sisco and other members of the Bloomfield Police Department who had allegedly attempted to arrest him without cause.

The jury began deliberating at 11:55 a.m. on January 28, 1981. At 4:00 p.m. they advised the court that they were not ready to reach a verdict and were sent home. The jury resumed deliberations at 9:00 a.m. the next day. At 12:15 p.m. they asked the Court whether Josette Amabile was asked whether she knew the police officers, and whether either Detective Peters or Detective Sisco testified that they were working together on the evening in question. Although these circumstances were not testified to, the judged told the jury they would have to rely on their own recollections. At 2:20 p.m. on January 29, the jury informed the court that they were unable to reach a unanimous decision. The judge instructed the jury to continue deliberating. At 3:55 p.m. the jury was sent home. On January 30, 1981, the jury began its third day of deliberations at 9:15 a.m. At 12:30 p.m. the judge called the jury into the courtroom and asked the foreman whether further deliberations would be fruitful. The foreman advised the trial judge that they would. At 3:10 p.m., the jury reached a verdict, finding defendant guilty of sexual assault and unlawful possession of a knife.

On March 26, 1981, the court denied defendant's motion for a new trial and sentenced him to an eight-year state prison term with a four-year parole disqualifier on the sexual assault count, and a concurrent eighteen-month term on the weapon count.

A notice of appeal was filed with the Appellate Division on May 11, 1981. In a *per curiam* opinion dated December 14, 1981, the Appellate Division affirmed defendant's conviction and sentence. The Appellate Division found that the trial court committed several errors, but found them to be harmless, and with respect to one issue not raised at trial, not plain error. A notice of petition and a notice of appeal were filed with the Supreme Court of New Jersey on January 3, 1983. The petition for certification was denied on March 2, 1983.

This was a one day trial which began and ended on Tuesday, January 27, 1981. Two weeks and one day prior to trial (on Monday, January 12, 1981), petitioner's trial counsel telephoned the assistant prosecutor and informed him that a notice of alibi was going to be filed. A notice of alibi was filed and served on the Prosecutor on January 21, 1981, six days prior to trial. It listed Florine Moore and her address.

The prosecutor argued that the alibi witnesses ought to be precluded from testifying because the notice failed to comply with the time requirement of New Jersey Court rule 3:11-1, notwithstanding the fact that the prosecutor had already interviewed Florine Moore the previous Friday.

Defense counsel stated that his notice was out of time because there had been a long period of time between his verifying that Ms. Moore was a witness, and his actually seeing her. As Ms. Moore was no longer defendant's "girlfriend," defendant had had trouble securing her for an interview. Defense counsel stated to the court that he wanted to speak to the witness before filing the notice. Defense counsel also argued that the state's case "would not be prejudiced one iota" and that the state probably had more information than he did, since the prosecutor had already interviewed Ms. Moore.

The trial judge not only denied the motion to add the name of Ms. Moore, but also precluded an alibi testimony. His entire ruling on the issue is as follows: "Mr. Greenspoon [defense counsel], I'm going to rule on the question of alibi that you're way out of time, I should preclude under the rules from assert-

ing that defense through other witneses other than the defendant [sic]. He may do so, I cannot stop him." (exhibit 9R at 7)

The Appellate Division found that the trial judge failed to follow the direction of *State* v. *Francis*, 128 N.J.Super. 346, 350-351, 320 A.2d 173 (App.Div.1974), with regard to determining whether the State had been disadvantaged by the late alibi notice, and if so, whether alternatives to exclusion of the witness were feasible. The Appellate Division further observed that while the trial judge failed to explore the need for and possibility of a reasonable continuance, "in a not even-handled manner, he granted the State's application to produce evidence beyond discovery supplied defendant by the State, and offered a continuance if defendant claimed to be surprised by the new material." (Exhibit 3R at Appendix 8a). The Appellate Division made no comment regarding the fact that the prosecutor had interviewed the alibi witness several days prior to trial.

The Appellate Division found that the proposed alibi testimony would have been of "dubious value." The court gave no indication as to how it reached that conclusion. The Appellate Division held that even if the exclusion of defendant's alibi witness constituted constitutional error, it was satisfied "beyond a reasonable doubt that any such error did not affect the verdict."

EXHAUSTION OF REMEDIES

A federal court will not consider an application for a writ of habeas corpus unless it appears that the applicant has exhausted the remedies available in the state courts. 28 U.S.C. § 2254(b). Not only must the applicant have fairly presented the substance of his habeas corpus claims to the state courts for adjudication on the merits, *Pitchess* v. *Davis*, 421 U.S. 482, 488, 95 S.Ct. 1748, 1752, 44 L.Ed.2d 317 (1975); *Picard* v. *Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971); *Swanger* v. *Zimmerman*, 750 F.2d 291, 295-96 (3d Cir.1984); *Jones* v. *Superintendant of Rahway State Prison*,

725 F.2d 40, 41 (3d Cir. 1984); *Zicarelli* v. *Gray*, 543 F.2d 466, 472-75 (3d Cir.1976), but he must have availed himself of all opportunities available in the state courts to raise the questions presented in his application. 28 U.S.C. § 2254(c); *Rose* v. *Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

The state argues that petitioner has not availed himself of all state remedies. It contends that even if petitioner has presented his claims to the Appellate Division and the Supreme Court of New Jersey, he still has recourse to the courts by application for post-conviction relief, pursuant to New Jersey Court Rule 3:22-1 et seq. This argument is meritless. It is well settled that once a claim has been directly appealed to the state's highest court, it will be considered exhausted even if no post conviction relief is sought. *Jones* v. *Superintendent of Rahway State Prison*, 725 F.2d 40, 41-42 (3d Cir.1984); *United States ex rel Hickey* v. *Jeffes*, 571 F.2d 762, 764 (3d Cir.1978); *United States ex rel Schultz* v. *Brierley*, 449 F.2d 1286 (3d Cir.1971); *Morrison* v. *Kimmelman*, 579 F.Supp. 796, 801 (D.N.J.1984).

The state also contends that the claims petitioner now raises, were not "fairly presented" in the state courts. It contends that if even one claim remains unexhausted, a federal court must dismiss the claim. *Rose* v. *Lundy*, 455 U.S. 509, 510, 102 S.Ct. 1198, 1199, 71 L.Ed.2d 379 (1982). The petitioner would then have the "choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.*

28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to consider his constitutional claim. *Anderson* v. *Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982); *Picard* v. *Connor*, 404 U.S. 270, 276-77, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971); *Brown* v. *Cuyler*, 669 F.2d 155, 158 (3d Cir.1982); *Zicarelli* v. *Gray*, 543 F.2d 466, 472 (3d Cir.1976). Petitioner does not satisfy this requirement by merely presenting the facts necessary to support the federal claim or by presenting a "somewhat

similar state-law claim." *Anderson* v. *Harless*, 459 U.S. at 6, 103 S.Ct. at 277. The habeas petitioner must have fairly presented to the state courts the "substance" of his federal habeas corpus claim. *Id.*

I now consider whether petitioner fairly presented the substance of his three claims to the state courts. Petitioner's first claim is that his conviction was obtained by depriving him of his sixth amendment right to call witnesses in his favor. Petitioner presented this argument both in his brief submitted to the Appellate Division (Exhibit 8R at 8) and in his petition for certification (Exhibit 3R at 7). Petitioner expressly referred to the violation of his sixth amendment right to present witnesses in his defense and cited federal precedent to support his arguments. The Appellate Division considered and rejected petitioner's Sixth Amendment argument, stating: "[E]ven if a constitutional error involving defendant's sixth amendment right occurred, a reversal would not be mandated since we are satisfied beyond a reasonable doubt that any such error did not affect the verdict." (Exhibit 3R Appendix at 8A).

The state acknowledges that the petitioner claimed a violation of the Sixth Amendment, but argues that "petitioner framed this claim primarily in terms of a violation of abuse of judicial discretion, pursuant to the New Jersey Court Rule 3:11-2". The state argues that petitioner did not fairly present his claim and has only stated "mere facts or grounds framed primarily in state procedural law and state case law." I disagree.

The state correctly observes that petitioner alleged that the exclusion of his witness constituted abuse of the trial judge's discretion in applying New Jersey Court Rule 3:11-2. However, this was a claim separate from and in addition to petitioner's constitutional claim. Petitioner's point heading in his brief to the Appellate Division made this clear. He argued: "The trial court's exclusion of the defendant's alibi witness constituted an abuse of discretion *and* violated the defendant's sixth amendment right to present witnesses in his defense." (exhibit 8R at

1, emphasis added). Petitioner aserted an alternate state-law ground for the court to consider but also fairly presented his federal constitutional claims.

The state's citation of numerous cases in which non-exhaustion is found is not persuasive. None of them apply to this case where the state court was presented with both a federal and state law claim. *Anderson* v. *Harless*, 459 U.S. 4, 7, n. 4, 103 S.Ct. 276, 279, n. 4, 74 L.Ed.2d 3 (1982) (citation to a state court decision predicated solely on state law ordinarily not sufficient to apprise a reviewing court of a potential federal claim); *Rose* v. *Lundy*, 455 U.S. 409, 102 S.Ct. 1188, 71 L.Ed.2d 379 (1982) (prisoner acknowledged non-exhaustion of two of his federal claims. "A district court must dismiss such mixed petitioners."); *Mabry* v. *Klimas*, 448 U.S. 444, 100 S.Ct. 2755, 65 L.Ed.2d 827 (1980) (state's highest court must be given an opportunity to consider petitioner's claim to right to be resentenced under new recidivist statute, even though petitioner had exhausted other claims related to alleged sentencing errors.); *Brown* v. *Cuyler*, 669 F.2d 155, 158 (3d Cir.1982) (*Miranda* waiver issue was distinguishable from involuntariness claim and was not fairly presented in the state court); *Zicarelli* v. *Gray*, 543 F.2d 466, 474 (3d Cir.1976) (mere reference by defendant's counsel to an opinion containing a constitutional claim did not fairly present the cross-section issue to the state courts).

I find that petitioner's claim of ineffective assistance of counsel in violation of the Sixth Amendment was fairly presented to the state courts. See Exhibit 3R at 16; Exhibit 8R at 29. The government does not dispute this finding.

Petitioner's final claim is that his conviction was obtained by improper reference to his probationary status and to prior arrests depriving him of a fair trial. The government argues that this claim is not cognizable on a habeas corpus petitioner. I disagree.

Mindful that complaints are to be liberally construed in the federal courts expecially when a party is proceeding *pro se*,

Haines v. *Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1971), I find that petitioner's habeas petition can reasonably be understood to raise a due process claim under the Fourteenth Amendment. Petitioner's failure to use specific constitutional language is not fatal for purposes of exhaustion. The Court in *Picard* v. *Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971) stated that "[w]e do not imply that respondent could have raised the [constitutional] claim only by citing 'book and verse on the federal constitution.' . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts."

A determination of whether the substance of the petitioner's claim was advanced in the state proceedings requires "a searching scrutiny by the federal habeas court of the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal habeas courts." *Zicarelli* v. *Gray, supra*. In order to determine whether the "same claim" or the "subsequent equivalent" of the claim has been previously presented to the state courts, it is necessary to ask whether the "method of analysis" asserted in the federal courts was readily available to the state court. *Id.* The "method of analysis" is to determine whether the evidentiary errors of the improper references to petitioner's prior arrests and his probationary status were "fundamentally unfair." *See Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

In his brief to the Appellate Division, petitioner framed his claim of improper reference to his prior arrests and his probationary status in terms of "reversible error" and cited only state law (exhibit 8R at 17). Nevertheless, petitioner argued that the error deprived him of a "fair trial" (Id. at 17) and violated his "fundamental rights." (Id. at 23). The government also viewed the claim as a question of whether defendant received a "fair trial." (State Appellate brief at 12). The Appellate Division also considered the fairness of admitting the evidence, stating: "We do not regard any error that may have been committed by the

trial judge to have been clearly capable of producing an *unjust* result." (Exhibit 3R at 9a) (emphasis added).

In making this determination, it can be fairly concluded that the state courts implicitly held that petitioner's right to due process of law was not violated. Petitioner's "broadly alleged constitutional argument, together with the repeated assertion that he was denied a fair trial, is enough to satisfy the exhaustion requirement." *Bisaccia* v. *Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 449 U.S. 1042, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980). "While the Appellate Division did not cite to the Fourteenth Amendment in its [opinion], its 'method of analysis' was consistent and synonymous with the classic findings required for Fourteenth Amendment violations." *Id.* at 310. *Cf. Santana* v. *Fenton*, 685 F.2d 71, 74 (3d Cir.), *cert. denied*, 459 U.S. 1115, 103 S.Ct. 750, 74 L.Ed.2d 968 (1982) (no exhaustion when petitioner did not present the right-to-testify argument in constitutional terms but in terms of the trial court's abuse of judicial discretion); *Paullet* v. *Howard*, 634 F.2d 117, 119 (3d Cir.1980) (no exhaustion where prosecutor's opening remarks presented to state courts as reversible error not as a constitutional violation).

The teaching of *Bisaccia, supra*, is applicable to this case. There the court stated "[b]ecause the substance of the appellant's state claim is virtually indistinguishable from the due process allegation now before the federal court, and because the method of analysis is indistinct, the *Picard* test for exhaustion of state remedies has been met. This conclusion is especially appropriate because of the necessarily vague nature of a due process allegation. Failure to invoke the Due Process Clause more specifically should not therefore stand in the appellant's path to habeas relief, especially since the state courts understood and considered the 'substantial equivalent' of the appellant's claims before this court and the court below." *Bisaccia*, at 312.

SCOPE OF REVIEW

"It has long been established, as to constitutional issues which may properly be raised under § 2254, that even a single

federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question." *Sumner* v. *Mata*, 449 U.S.539, 543-44, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981).

However, under 28 U.S.C. § 2254(d), a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply. Subsection (d) reads as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
>
> And in an evidentiary hearing in the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Congress enacted subsection (d) "to insure that a state finding [of fact] not be overturned merely on the basis of the usual 'preponderance of the evidence' standard." *Sumner* v. *Mata*, 449 U.S. at 552, 101 S.Ct. at 769. In order to ensure that this mandate is enforced, the Supreme Court has held that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Id.*

An examination of the trial judge's statement indicates that he would apply the sanction of precluding petitioner's alibi witness solely because of defense counsel's untimeliness in asserting an alibi defense in violation of N.J. Court rule 3:11-1 and 3:11-2. Those rules read as follows:

> **3:11-1. Bills of Particulars; Amendment**
>
> If a defendant intends to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney and within 10 days thereafter, furnish a written bill of par-

ticulars, signed by him, stating the specific place or places at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense. The trial court may order the amendment or amplification of such particulars, or of the time of their service, as the interest of justice requires.

3:11-2. Failure to Furnish

If such bill of particulars is not furnished as required, the court may refuse to allow the party in default to present witnesses at trial as to defendant's absence from or presence at the scene of the alleged offfense, or make such other order or grant such adjournment as the interest of justice requires.

The trial judge's finding that defense counsel submitted his notice of alibi in an untimely manner will be presumed correct under § 2254(d). However, as the Appellate Division noted, the trial judge made no findings of fact concerning whether petitioner purposefully withheld his alibi defense from the state, whether petitioner fabricated his alibi defense, whether the State was prejudiced by the untimely notice, whether the alibi witness' testimony was particularly important to petitioner's defense or merely cumulative, whether other less severe sanctions could have been reasonably imposed on petitioner or defense counsel, or whether a continuance would not have been feasible under the circumstances.

The Appellate Division's finding that the proffered testimony was of "dubious value" appears to be a determination either that the proffered testimony would not have been credible or that the testimony would have been cumulative of defendant's own testimony concerning his alibi. Even if the Appellate Division's finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and *Sumner* v. *Mata*, several excep-

tions to the presumption apply here. First, the material facts underlying the finding were not adequately developed by the trial court. 28 U.S.C. § 2254(d)(3). Second, petitioner did not receive a "full, fair, and adequate hearing" on the issue of the credibility or importance of Ms. Moore's testimony. *Id.* § 2254(d)(6). Finally, the finding is "not fairly supported by the record." *Id.* § 2254(d)(8). There is no indication in the record that Ms. Moore's testimony would not have been credible and important to petitioner. Therefore, the Appellate Division's finding that Ms. Moore's testimony would have been of "dubious value" will not be presumed correct.

The United States Supreme Court has recently stated that "[i]n the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller* v. *Fenton*, ___ U.S. ___, ___, 106 S.Ct. 445, 451-53, 88 L.Ed.2d 405 (1986). In *Miller* the Court reversed the Third Circuit's denial of a habeas corpus petition. The Third Circuit had held that the determination of the voluntariness of petitioner's confession was a question of fact to be accorded the presumption of correctness. *Miller* v. *Fenton*, 741 F.2d 1456, 1464 (3d Cir.1984), reversed at ___ U.S. ___, 106 S.Ct. 445 (1985). The Supreme Court held that the issue was a question of law subject to "plenary federal review." ___ U.S. at ___, 106 S.Ct. at 451-53.

The Court provided guidelines to be used in determining whether an issue involves a question of law or a question of fact, stating: "At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." ___ U.S. at ___, 106 S.Ct. at 451-53. A situation which would justify extending deference to the trial court would exist if, for example, "the issue involve[d] the credibility of witnesses and therefore turne[d] largely on an evaluation of demeanor."

Id. The Court found that "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness."

In the instant case, there is no issue concerning the legal or factual character of the state court findings. Had the state court made findings concerning the defendant's state of mind in waiving his right to present an alibi witness, the issue might have arisen. I expressly make no determination as to whether such finding would be a question of law to be presumed correct under § 2254(d) or whether the issue would be subject to plenary federal review as a matter of constitutional law.

I need not review petitioner's claims of ineffective assistance of counsel and denial of a fair trial by reference to prior arrests and probationary status, since I have decided to grant his petition for habeas relief based on the denial of his right to present witnesses in his favor.

THE MERITS

The right to present witnesses in one's defense is a fundamental right guaranteed by the Sixth Amendment and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Chambers* v. *Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973); *Washington* v. *Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington* at 19, 87 S.Ct. at 1923.

Although the state may not prohibit the exercise of this right, it clearly may condition it on reasonable rules designed

to further legitimate state interests. The Supreme Court has recognized that the State has a legitimate interest in preventing a criminal defendant from concocting a last minute alibi, and has upheld the constitutionality of a notice of alibi statute which provides the defendant with reciprocal discovery rights. *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893. 26 L.Ed.2d 446 (1970). It has expressly reserved, however, the question presented here—whether the enforcement of such a statute by the exclusion of testimony violates the defendant's right to compulsory process. *Wardius* v. *Oregon*, 412 U.S. At 472, n. 4, 93 S.Ct. at 2210, n. 4; *Williams* v. *Florida*, 399 U.S. at 83, n. 14, 90 S.Ct. at 1896, n. 14; *Smith* v. *Jago*, ___ U.S. ___, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985) (White dissenting from denial of petition for a writ of certiorari); *Taliaferro* v. *Maryland*, 461 U.S. 948, 103 S.Ct. 2114, 77 L.Ed.2d 1307 (1983) (same).

Federal courts faced with sixth amendment challenges to witness preclusion orders have offered varied responses. The Fifth Circuit is the only court to have found that witness preclusion orders imposed solely as sanctions to enforce discovery orders against criminal defendants *per se* violate the compulsory process clause of the sixth amendment. *United States* v. *Davis*, 639 F.2d 239, 243 (5th Cir.1981). *See also Fendler* v. *Goldsmith*, 728 F.2d 1181, 1185-87 (9th Cir.1983) (analyzing the *Davis* court's approach).

Most other courts, including the state courts of New Jersey, have applied a balancing test, holding that the government's interest in enforcing discovery rules should be balanced against the defendant's right to call witnesses in his favor. *See, e.g.*, *Fendler* v. *Goldsmith*, 728 F.2d 1181, 1187 (9th Cir.1983) (habeas petitioner entitled to relief under both the balancing approach and the *Davis* approach). *Chambers* v. *Mississippi*, 410 U.S. at 295, 93 S.Ct. at 1045 (the sixth amendment right to call and examine witnesses is "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. . . . But its denial or significant diminu-

tion calls into question the ultimate integrity of the factfinding process and requires that the competing interest be closely examined."); *Ronson* v. *Commissioner of Cor. of State of N.Y.*, 604 F.2d 176 (2d Cir.1979) (habeas petitioner entitled to relief where he gave adequate notice of intention to use insanity defense and government was not prejudiced by technical noncompliance with discovery rule); *United States ex rel. Enoch* v. *Lane*, 581 F.Supp. 423 (N.D.Ill.1984) (habeas petitioner entitled to relief where there is no evidence that he purposefully withheld the name of a material witness and where the witness' testimony was very important to his defense); *United States ex rel. Robinson* v. *McGinnis*, 593 F.Supp. 175, 181 (C.D.Ill.1984) (where trial judge only made a limited inquiry into habeas petitioner's failure to raise an alibi defense in a timely fashion, preclusion was too severe a sanction); *Hacket* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980) ("in view of highly technical nature of his counsel's error, the absence of any evidence of complicity by petitioner in that error, the lack of any prejudice to the State caused by the error, the severe prejudice to petitioner caused by the preclusion sanction by the prosecution before the jury . . ." defendant was entitled to habeas relief); *State* v. *Francis*, 128 N.J.Super. 346, 351, 320 A.2d 173 (App. Div. 1974) (adopting balancing test but finding preclusion to be harmless error).

Other circuits have only considered preclusion of alibi and alibi-rebuttal witnesses in the context of direct review of federal cases determining only whether there was an abuse of discretion and without considering sixth amendment violations. *See United States* v. *Woodward*, 671 F.2d 1097 (8th Cir.1972) (not an abuse of discretion where trial judge did not exclude government's alibi-rebuttal witness where government failed to disclose names of rebuttal witnesses in discovery); *United States* v. *White*, 583 F.2d 899 (6th Cir.1978) (not an abuse of discretion where trial judge precluded defendant from presenting alibi witness after defendant rested his case where trial judge found that defendant deliberately disregarded the discovery rule); *United States* v. *Fitts*, 576 F.2d 837 (10th

Cir.1978) (although better practice would have allowed defendant to present alibi testimony, wording and history of Federal Rule of Criminal Procedure 12.1 contemplated such exclusion and trial judge did not abuse his discretion); *United States* v. *Barron*, 575 F.2d 752 (9th Cir.1978) (not an abuse of discretion for trial judge to preclude alibi witness where government served discovery request eleven days before trial and defendant's response came two days late).

I find that the balancing test is the correct standard to be applied in reviewing a habeas petition where the state court imposed a witness preclusion sanction to enforce the state's notice of alibi rule. Therefore, I will follow the standard applied in *Fendler, supra*. The weight of authority and a proper consideration of state interests supports the balancing test. *See, e.g.*, *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980) (applying a balancing approach). An absolute prohibition of using the witness preclusion sanction to enforce notice of alibi rules is unnecessary. Such a prohibition could result in making trial courts powerless to prevent criminal defendants from concocting last minute alibis. A habeas court can take all factors into account by employing a balancing test.

I turn now to the question of whether the State's interests in enforcing its discovery rule outweight petitioner's sixth amendment right to call witnesses in his favor. As stated previously, the state courts made no findings of fact which address this issue and to which I could defer. Thus, an independent search of the record must be made.

I find that the testimony of an alibi witness would have strengthened petitioner's case. Ms. Moore's testimony would have been neither cumulative of other evidence nor a waste of time. By definition, if a jury finds the testimony of an alibi witness to be credible and believes a defendant was elsewhere when the crime occurred, it will acquit the defendant. The fact that the jury took two and one-half days to reach a verdict also indicates that the testimony of an alibi witness may have created reasonable doubt.

Furthermore, there is no evidence that defendant purposefully withheld Ms. Moore's name from the State. Based on the record, it appears that the petitioner did tell his attorney about Ms. Moore. However, "[e]ven wilful noncompliance by an attorney which may not be attributed to the client does not constitute waiver [of sixth amendment rights]." *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1336 (D.N.J.1980).

In addition, the State did not show what prejudice, if any, it would have suffered. To the contrary, the prosecutor had already interviewed Ms. Moore prior to trial. If the State had required a continuance to prevent prejudice, this alternative could have been pursued. The trial judge's offer of a continuance for defense counsel to research newly acquired discovery shows that such an alternative was indeed feasible.

I find that where the witness could have strengthened petitioner's case, where the state has not shown that defendant purposefully withheld notice of his witness, and where the state showed no prejudice in allowing the witness to testify, the trial court committed constitutional error in imposing the witness preclusion sanction. Under the circumstances in this case, therefore, the record as a whole shows that the petitioner's sixth amendment right to call witnesses in his favor outweighed the state's interest in enforcing its discovery rules and that the state court's preclusion of petitioner's alibi witness justified only by the untimely response of defense counsel to the state's discovery request denied petitioner fundamental rights and due process of law.

HARMLESS ERROR TEST

Because the trial court's error affected substantial constitutional rights, I must determine whether the error was "harmless beyond a reasonable doubt." *See, e.g., Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Third Circuit recently reviewed the *Chapman* standard in *Holland* v. *Attorney General of New Jersey*, slip op. November 22, 1985. There the court stated:

> it is now established law that erroneous admission of evidence, even evidence admitted in violation of a constitutional right, is not automatically reversible error. In *Chapman* v. *California*, . . . the court held that federal constitutional errors which are harmless beyond a reasonable doubt do not require reversal, but that the beneficiary of the error, the state, bears the burden of proving harmlessness. *Id.* at 23-24 [87 S.Ct. at 827-28]. In *Chapman*, the inquiry into harmlessness was articulated as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 [87 S.Ct. at 827] (*quoting Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 [84 S.Ct. 229, 230, 11 L.Ed.2d 171] (1963).)
>
> Whether the alleged constitutional error was harmless is a question of federal law. *Rushen* v. *Spain*, 464 U.S. 114, 120 [104 S.Ct. 453, 456-57, 78 L.Ed.2d 267] (1983). This frequently requires that the federal habeas court review the untainted evidence. . . . Slip op. at 12-13.

In reviewing the evidence, "the court must assess the 'probable impact of the [error] on the minds of an average jury.'" *Allison* v. *Gray*, 603 F.2d 633, 634 (7th Cir. 1979) (quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828 (1969)).

The Appellate Division, in reviewing this case, stated regarding the notice of alibi issue:

> . . . if error was committed in this respect we are satisfied that it was harmless. Not only was the nature of the proposed alibi testimony such as to have been of dubious value, but the evidence presented by the state . . . overwhelmingly established defendant's guilt. Thus, even if a constitutional error involving defendant's sixth amendment right occurred, a reversal would not be mandated since we are satisfied beyond a reasonable doubt that any such error did not affect the verdict. *State* v. *Macon*, 57 N.J. 325, 340 [273 A.2d 1] (1971).

I disagree with this assessment of the harmless nature of the error.

By definition, if a jury finds the testimony of an alibi witness to be credible and believes a defendant was elswhere when the

crime occurred, it will acquit the defendant. Obviously the erroneous exclusion of such testimony could affect the verdict. In this case, the only testimony presented in support of defendant's alibi defense was by the defendant himself. I cannot find beyond a reasonable doubt that corroborating alibi testimony would not have affected the verdict.

The harm was further aggravated when the trial court allowed the state to cross examine the petitioner about his lack of alibi witnesses and subsequently allowed the state to comment upon the absence of alibi witnesses to the jury.

In cross-examining Braunskill, the prosecutor questioned him as follows regarding his whereabouts at the time the crime occurred:

> Q: And all these people saw you there at the Sixty-five Club that evening. Isn't that correct?
>
> A: Yes, yes.
>
> Q: And since June 12, have you spoken to any of these people?
>
> A: Yes, I have tried to get them to come to court, yes.
>
> Q: But none of them are coming to court. Isn't that correct?
>
> A: From what I can see, yes, they haven't been.
>
> Q: And did you tell your attorney to get them?
>
> A: Yes, I told him, but he told me they would be no good to me if they're not willing to come on their own. Trial Transcript, 1/27/81, 115-20 to 116-6.

In his summation, the prosecutor made the following statements in spite of an objection by defense counsel and a warning by the trial judge that he was in "a very potentially dangerous zone:"

> And if that wasn't enough, there's even more, more absurdity to his whole story. He said he was at several bars and saw many friends of his. As a matter of fact, two of his

> friends who he name from the witness stand had given him a ride, that ride to the Halftime Emporium, and these people, all these people, maybe fifty, sixty, seventy people in all these places, could verify, could corroborate his story. . . . He said he wasn't going to force them to come in. Is that believable? Is that credible? Trial Transcript, 1/28/81, 35-25 to 37-13.

Furthermore, the state's evidence does not overwhelmingly demonstrate petitioner's guilt so as to support a finding that the error was harmless. The victim herself was unable to identify the petitioner from photographs while the incident was fresh in her mind. Admittedly the two witnesses did select his photograph. However, they did so based on viewing the assailant for a matter of seconds, and they are shown only six photographs. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1932-33, 18 L.Ed.2d 1149 (1967); *State in the Interest of W.C.*, 85 N.J. 218, 224, 426 A.2d 50 (1981). With regard to photographic identification, the United States Supreme Court has recognized:

> A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification.

Simmons v. *United States*, 390 U.S. 377, 381, 383-84, 88 S.Ct. 967, 969, 970-971, 19 L.Ed.2d 1247 (1968).

The Third Circuit has recently analyzed the reliability of eyewitness testimony in approving the use of experts in the field of human perception and memory. Such experts may properly testify to the reliability of eyewitness identification

and satisfy the helpfulness standard of Fed.R.Evid. 702. The court listed numerous factors which it found could affect the reliability of eyewitness testimony. They are as follows:

> (1) the "forgetting curve," i.e. the fact that memory does not diminish at a uniform rate;
>
> (2) the fact that contrary to common understanding, stress causes inaccuracy of perception and distorts one's subsequent recall;
>
> (3) the "assimilation factor," which indicates that witnesses frequently incorporate into their identifications inaccurate information gathered after the event and confused with the event;
>
> (4) the "feedback factor," which indicates that where identification witnesses discuss the case with each other they can unconsciously reinforce their individual identifications; and
>
> (5) the fact that studies demonstrate the absence of a relationship between the confidence a witness has in his or her identification and the actual accuracy of that identification. *United States* v. *Downing*, 753 F.2d 1224 (3d Cir.1985).

The court also recognized other variables approved by the Sixth Circuit:

> (1) that a witness who does not identify the defendant in a first line-up may 'unconsciously transfer' his visualization of the defendant to a second line-up and thereby incorrectly identify the defendant the second time;
>
> (2) that studies demonstrate the inherent unreliability of cross-racial identifications; and
>
> (3) that an encounter during a stressful situation decreases the eyewitness' ability to perceive and remember and decreases the probability of an accurate identification. *Id.* at 1231.

Some of these factors support my finding that the state's properly adduced evidence was not overwhelming and that the evidence was incapable of overcoming the erroneous preclusion of petitioner's alibi witness.

Based upon the non-cumulative nature of the evidence, the fact that an alibi witness would have provided a more solid basis for the defense theory of the case, the fact that the jury in petitioner's trial took two and one-half days to deliberate over the evidence without the alibi witness and the fact that the state's properly adduced evidence was not overwhelming, I cannot conclude beyond a reasonable doubt that the state court's error was harmless.

I realize that two highly respected judges reached an opposite conclusion in affirming petitioner's conviction. As this opinion demonstrates, I plainly disagree with that panel's conclusion.

Petitioner was tried before a very able judge whose reputation needs no embellishment by this court. However, the trial court's refusal to permit the petitioner to introduce alibi testimony crucial to his case "visited a terrible punishment on a party [guilty of a] minor transgression of the rules. . . . He was deprived of the right to defend himself. The prosecutor's conduct in using the defense which the jury was not permitted to hear to undermine the credibility of the defense which they did hear was grossly unfair." *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980).

In granting the relief sought, this court is not unmindful of the egregious nature of the offense committed on an old woman. However, to countenance this constitutional transgression would undermine that palladium of our liberties, the Constitution, and the jewel in that document, the Bill of Rights.

Although this court has the authority to unconditionally order petitioner's enlargement, *see United States ex rel. Thomas* v. *New Jesey*, 472 F.2d 735, 742 (3d Cir.1973), I will give the state a reasonable time in which to retry petitioner. A writ of habeas corpus shall issue unless within 30 days the State of New Jersey shall afford petitioner a new trial.

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5204.

DANA BRAUNSKILL,

v.

GARY HILTON, Warden
and State of New Jersey
W. Carv Edwards, Attorney General
of the State of New Jersey, et al.

Appellants

On Appeal From The United States District Court
For The District Of New Jersey (Newark)
Civil No. 85-2008.
Argued October 27, 1986
Before: ADAMS, HIGGINBOTHAM, and GARTH, *Circuit Judges*
(Filed December 2, 1986)

OPINION OF THE COURT

PER CURIAM

This is an appeal from an order of the district court granting a petition for a writ of habeas corpus by a state prisoner who was incarcerated as a result of being convicted on two felony counts.

I.

Dana Braunskill was arrested for a sexual assault on an elderly woman. The attack occurred after midnight on June 12,

1981 in an apartment building lobby in Bloomfield, New Jersey. It was partially witnessed by two other residents of the apartment complex, and these residents, and the victim, Jane Lyons, summoned the police.

One witness, Josette Amabile, stated initially that she had failed to get a "good look" at the assailant because she was in the apartment house elevator before she realized what was happening; she related that she saw a black youth sitting or squatting and an elderly white woman on her knees in front of him. She later asserted that she had made eye contact with the assailant for 5 to 10 seconds, at which point the assailant had covered his face and groaned. She was shown a photo array of six photographs, and identified Braunskill's photograph as that of the assailant. The other witness, Joseph Scherer, had tried unsuccessfully to chase away the assailant, and had had a full view of him. He too was shown a photo array of six photographs, and selected Braunskill's picture. The victim was unable to see the assailant's face, but gave a general description (moderate-sized black youth in dark clothes, a jacket, and tennis shoes); she was unable the following evening to identify her assailant from the photo array. At trial, the victim testified that she believed that the defendant was her assailant.

Braunskill testified in his own defense, giving a detailed description of his wanderings on the night in question. His account seems to strain logic at points, but we cannot say that no rational jury could credit it. The most important element of defendant's attempted explanation of his whereabouts is the assertion that he arrived at the apartment of his girlfriend, Florine Moore, some distance from the scene of the attack, shortly before the time the attack occurred, and that he remained there for the rest of the evening. That testimony, along with some inuendo of a vendetta against Braunskill by a few individual police officers, and attacks on the credibility and accuracy of the eyewitnesses, constituted the whole of Braunskill's defense.

Defendant's counsel had intended to call Florine Moore as an alibi witness to confirm that Braunskill had been at her apart-

ment throughout the time of the assault. New Jersey Court Rule 3:11-1 requires the timely filing of a notice by the defendant of alibi, and that the defendant provide the name and address of any alibi witness. Braunskill's attorney served the appropriate written notice, but did so out of time. Rule 3:11-2 stipulates that in the event of a violation of Rule 3:11-1, "the court may refuse to allow the party in default to present [alibi witnesses] . . ., or make such other order or grant such adjournment as the interest of justice requires."

Prior to the impaneling of the jury, Braunskill's trial attorney asked permission to put Moore on the stand at trial, notwithstanding his failure to file a timely notice of an alibi defense. This request was opposed by the prosecutor who claimed unfair surprise because of the defendant's failure to comply with Rule 3:11-1. It emerged, however, that Braunskill's lawyer had notified the prosecutor by phone of his intention to call Moore approximately two weeks earlier, that he had formally notified the prosecutor in writing the previous week, that this had provided the prosecutor with sufficient time not only to interview Moore but to find and talk with the individual with whom she was speaking on the phone when Braunskill allegedly arrived at her apartment, that this was in fact more than Braunskill's attorney himself had done, and that the prosecutor was himself prepared to call both Moore and her telephone companion if he deemed it necessary.

Braunskill's counsel explained that his failure to file timely notice was a consequence of the fact that he wished to speak with Moore before deciding to employ her as an alibi witness, and that he had failed to contact Moore for several months, apparently because he left it entirely to Braunskill himself to track her down (Braunskill and Moore had parted company following Braunskill's arrest). The trial judge ruled that because of the failure of Braunskill's counsel to file a timely notice of alibi testimony, he would not allow Moore to testify.

The presentation of all the evidence consumed less than a full day of trial. During cross-examination and in his closing state-

ment, the prosecutor alluded to the fact that there were no witnesses in the courtroom to substantiate Braunskill's alibi defense. The jury began deliberations just before noon of the following day; at 3:15 p.m. they requested a rereading of the testimony of both Braunskill and one of the two eyewitnesses. Shortly after noon on the second day of deliberations the jury asked the judge a further question concerning the testimony of the same eyewitness, and then at 2:20 p.m. reported that they were unable to reach a unanimous verdict. The judge instructed them to continue deliberating. At 3:10 p.m. on the third day of deliberations, the jury reached a verdict of guilty of sexual assault and unlawful possession of a knife. Braunskill was sentenced on March 26, 1981 to eight years imprisonment, with a minimum term of four years.

An appeal was taken to the Superior Court of New Jersey, Appellate Division, on May 11, 1981. On the appeal, Braunskill raised as the first of several points that the trial judge's ruling on the alibi-notice question "constituted an abuse of discretion and violated defendant's sixth amendment right to present witnesses in his defense." (Appendix at 303) The Appellate Division affirmed Braunskill's conviction, and stated that "because of the cursory manner in which the trial judge disposed of the issue without stating any of his reasons for excluding alibi witnesses, we are unable to determine whether that exclusion constituted an abuse of judicial discretion." (App. at 372) The appeals court noted that the trial judge had ignored state decisional law directing him to resolve whether the State would have been unfairly surprised and, if so, whether that surprise could be redressed by the grant of a reasonable continuance. (*Id.*) The court observed that, in contrast, on the separate issue of the State's improper withholding of discovery material from Braunskill, the trial court had been willing to grant a continuance rather than sanction the prosecution. (App. at 373) The Appellate Division held, however, that "if error was committed in this respect," it was harmless. (*Id.*) The court stated that the alibi testimony would have been "of dubious value," although it gave no indication why it believed

this to be so. (*Id.*) The Court also found the other trial errors to be harmless.

Braunskill then sought a writ of review in the New Jersey Supreme Court, which was denied on March 2, 1983. (App. 380) In 1985, Braunskill filed a petition *pro se* in the United States District Court for the District of New Jersey for a writ of habeas corpus, on the grounds of deprivation of his right to call witnesses in his defense and of ineffective assistance of counsel constituted a violation of his sixth amendment rights. (App. 386-87) In its answer, the State opposed the writ on four grounds: that Braunskill had failed to exhaust state remedies because he had not sought post-conviction relief (App. 426-27); (2) that Braunskill had not "fairly presented" the sixth amendment/alibi witness issue to the state courts, as required, because he had devoted more time in his brief in the Appellate Division to the state law discretion issue than to the federal constitutional issue, and because the Appellate Division in its opinion did likewise (App. 428); (3) that Braunskill's complaint was not cognizable on habeas because it concerned only state law (App. 429-30); and (4) that since Braunskill had not exhausted all his claims (i.e., the sixth amendment compulsory process claim), he could not raise his other contentions on habeas (App. 430). The State did not raise in the district court the issue of procedural default necessitating a showing of "cause and prejudice" under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

On February 27, 1986, Judge Ackerman, granted Braunskill's petition. He found that Braunskill had exhausted his state remedies, because "once a claim has been directly appealed to the state's highest court, it will be considered exhausted even if no post conviction relief is sought." (App. 444) (citing *Jones* v. *Superintendant of Rahway State Prison*, 725 F.2d 40, 41-42 (3d Cir. 1984); *United States ex rel Hickey* v. *Jeffes*, 571 F.2d 762, 754 (3d Cir. 1978); *United States ex rel Schultz* v. *Brierley*, 449 F.2d 1286 (3d Cir. 1971); *Morrison* v. *Kimmelman*, 579 F. Supp. 796, 861 (D.N.J. 1984)). He also

found that the defendant had indeed "fairly presented" his contentions to the state courts.

Reaching the merits, Judge Ackerman ruled that while the sixth amendment guarantees the right to call witnesses in one's own defense, a state may impose reasonable conditions on the exercise of that right. He further held that a balancing approach to, rather than a *per se* prohibition of, exclusion of alibi witnesses is therefore appropriate. Addressing this balancing, Judge Ackerman determined that an alibi witness would have strengthened Braunskill's case and created reasonable doubt; that there was no evidence that Braunskill himself withheld the alibi information from the court or prosecution; and that the State had not shown any prejudice. He therefore concluded that the defendant's constitutional rights had been violated at trial. Judge Ackerman found that the error was not harmless beyond a reasonable doubt, and thus ordered that writ issue unless the state retried Braunskill within 30 days.

The State appealed to this Court, and unsuccessfully sought a stay of Braunskill's release pending appeal. A panel of this Court denied the stay, and the entire Court then denied a petition for rehearing *in banc*. The issue of the stay of Braunskill's release on habeas pending appeal and retrial is now before the Supreme Court on a writ of certiorari. Before us now is the question whether the district court erred in granting the writ of habeas corpus.

II.

In *Wainwright* v. *Sykes*, *supra*, the Supreme Court reached its latest resolution of the thorny question whether state procedural rules stand on the same footing as state substantive law in establishing an independent and adequate state ground for a judgment, thus precluding federal review pursuant to a petition for habeas corpus. *Sykes* broadened the circumstances in which default under state procedure would constitute such a bar to federal review. The Supreme Court explicitly rejected the "sweeping language" of *Fay* v. *Noia*, 372 U.S. 391 (1963),

"which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." Instead, the Court adopted "the rule of *Francis* v. *Henderson*," 425 U.S. 536 (1976), "barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver." *Sykes*, 433 U.S. at 87.

The Supreme Court has held, however, that when a state has failed to raise the *Sykes* objection to preclude review of a habeas claim in the district court, the Court will not take cognizance of the issue on appeal. *See Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). In *Jenkins*, the Court explained that the Supreme Court was not the proper forum in which to raise initially a *Sykes* claim, because the issue could turn on questions of state law or questions of fact, either of which is better addressed first in the district court. This rationale would seem to apply as well, if with a bit less force, to the courts of appeals. And in any case, both *Smith* and *Jenkins* make clear that *Sykes* requirements are not jurisdictional, so that a reviewing court need not consider the issue when it is not properly raised by the prosecution. Moreover, in *Engle* v. *Isaac*, 456 U.S. 107, 124 n.26 (1982), where the state had failed to present the *Sykes* issue to the district court but the district court addressed it nonetheless, as did the court of appeals, the Supreme Court also considered the issue, over the petitioner's objections. The Court held that the petitioner should have raised in the district court or the court of appeals the state's "waiver" of its *Sykes* claim.

The net effect of these cases is that the prosecution may forfeit its right to raise a *Sykes* procedural default issue on appeal by failing to press it in the district court, *Barrera* v. *Young*, 794 F.2d 1264, 1268 (7th Cir. 1986); *Boykins* v. *Wainwright*, 737 F.2d 1539, 1545 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1775 (1985); *Washington* v. *Watkins*, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982), although a habeas petitioner may also forfeit his right to raise in turn the

state's "waiver" by failing to object to a later attempt to resurrect the issue. Consequently, Braunskill properly objects here to our addressing the *Sykes* issue because it was not raised below and was not considered by the district court.

Moreover, even if Braunskill's "default" in this case were the kind of "procedural default" that would bar review on habeas absent "cause and prejudice"—a proposition which we do not address—it is settled law that if the state courts themselves allowed review of the defendant's claim, then a federal court is free to address it as well. *United States* v. *Frady*, 456 U.S. 152, 166 n. 15 (1982); *Engle* v. *Isaac*, 456 U.S. 107, 136 n.44 (1982); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975); C. Wright, *Law of Federal Courts* § 53, p. 343 (4th Ed. 1983). The New Jersey Appellate Division clearly was presented with the constitutionality of the exclusion of Braunskill's alibi witness. Braunskill therefore is not precluded under *Sykes* from raising the issue on habeas.

We note, however, that Braunskill's claim here is a strong one even under the "cause-and-prejudice" standard. Unlike the merely "technical" prejudice against which the Supreme Court has been most on guard, Braunskill alleges a deprivation that goes to the very reliability of the "truth-seeking" process itself and which substantively prejudiced his defense: namely, that he could not have been Lyon's assailant because he was at Moore's apartment at the time of the crime. The strongest available corroborative evidence of this alibi was foreclosed on a narrow and draconian technical ruling questionable even as a matter of state law.[1] Braunskill here seeks to vindicate a cen-

---

[1] The Appellate Division of the New Jersey Superior Court determined that "the [trial] judge did not follow the direction of State v. Francis . . . since he failed to resolve the question of whether the state would have been unfairly surprised and, if so, whether that disadvantage might have been redressed by a reasonable continuance." 128 N.J. Super. 346. *See also State* v. *Volpone*, 150 N.J. Super. 524, 530 (App. Div. 1977), aff'd 75 N.J. 543 (1977). ("Before invoking the ultimate sanction of barring a witness, the court should explore alternatives.").

tral, substantive right in the face of a technical ruling—the exact opposite of the exaltation of form over substance against which the *Sykes* "prejudice" standard is a reaction.

Similarly, the "cause" requirement of *Sykes* is designed to keep defendants and their lawyers from "sandbagging" the prosecution in state court, calculating that they might do better to raise an issue for the first time in federal court. *Sykes*, 433 U.S. at 89, 90. Where the default is not the result of a defendant's own connivance or the conscious decision (no matter how misguided) of a defendant or his counsel to "default," the "cause" barrier does not bar consideration of the claim. Such is the case here. Although defense counsel may have been inartful in failing to comply with the alibi rule, there is no evidence that his was a tactical decision, or a calculation on the defendant's part to try to disadvantage the government, nor that the "default" involved the contemplation of saving an "ace in the hole" for later litigation.

III.

When error of constitutional dimension attaints a trial proceeding, the Supreme Court has declared that it is our task on review to determine whether the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). Whether the constitutional error was harmless is a question of federal law. *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983); *Holland* v. *Attorney General of New Jersey*, ____ F.2d ____ (3d Cir. 1985).

With this admonition as a guide, we conclude that Judge Ackerman did not err in holding that the preclusion of the alibi witness in this case was not harmless error. Braunskill's entire defense was based upon his alibi, and Florine Moore was not simply the primary, but the only, source of corroboration. Had the jury believed Moore's testimony, they perforce would have acquitted Braunskill. Without an alibi defense, the defendant had essentially no defense. The corroborating witness was to be the keystone of Braunskill's position. Indeed, the prosecutor used the absence of corroborating witnesses as a point of attack

both during the trial and in his summation. Braunskill's own testimony, while at points confusing and susceptible of an unfavorable reading, can, contrary to the State's assertion, be read to support his alibi claim; this makes Moore's potentially corroborating testimony as to the crucial fact concerning his whereabouts all the more pivotal. The jury considered this a close and difficult case, first reporting itself unable to reach a verdict, and finally taking three days to reach a verdict after a one-and-a-half day trial. The jury asked that Braunskill's own version of the events on the night in question be reread to them, and twice asked questions concerning the eyewitness testimony. Given this, we cannot say beyond a reasonable doubt that the jury would not have acquitted Braunskill had the alibi witness been allowed to testify.

This is neither any easy case nor a pleasant conclusion, but we believe the result to be mandated by the law as established for reviewing courts in *Chapman, supra*, and *Fahy, supra*. As we have observed before,

> [w]hile the error may not have contributed to petitioner's conviction, this Court is simply unable to conclude, on the basis of an independent examination of the record, that "there is [not] a reasonable possibility that [it] might have contributed to the conviction," and this is the test mandated by the Supreme Court in Fahy v. Connecticut. . . . Frequently, appellate courts are called upon, in performing an appropriate reviewing function, to determine whether any error that has been committed may be adjudged "harmless." So often, this is an assignment not free from deep concern. But because it is required, we must resolutely and objectively discharge it, whatever our own predilections may be.

United States ex rel. Macon v. *Yeager*, 476 F.2d 613, 617 (3d Cir. 1973).

V.

For the reasons stated, the judgment of the district court will be affirmed.

No. 86-108

Supreme Court, U.S.
FILED
MAR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case included in Petitioners' Brief on the Merits, supplemented only by the following additional facts.

On March 3, 1987, the United States Court of Appeals for the Third Circuit issued an order vacating its order and decision affirming the district court's grant of a writ of habeas corpus to Dana Braunskill and granting rehearing. (Appendix A). On March 5, 1987, the same court scheduled rehearing in the *Braunskill* matter for April 9, 1987. (Appendix B).

LEGAL ARGUMENT

POINT I. STRONG FEDERAL INTERESTS MANDATE THE CONSIDERATION OF DANGEROUSNESS AND THE CHANCES OF SUCCESS ON APPEAL IN DETERMINING WHETHER TO STAY RELEASE OF A SUCCESSFUL HABEAS PETITIONER PENDING APPEAL.

In his brief on the merits, respondent invokes principles of comity and federalism, the wording and history of Fed. R. App. P. 23(c), and an asserted status as a pre-trial indictee, to justify the decision below that federal courts are unequivocally precluded from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting release will be reversed on appeal when determining whether to stay release pending appeal.

Respondent's reliance on these factors and on the decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993

(3d Cir. 1986) is mistaken. The tunnel vision approach of *Carter*, which limits the federal court's inquiry to the habeas petitioner's amenability to future federal process, blinded the *Carter* court to concerns of comity and federalism, the wording and history of Rule 23(c) and 28 U.S.C. § 2243, the realities of widespread practice, and the actual position of a state-court convicted petitioner who is successful in district court.

Initially, it is unrealistic to analogize respondent to a pre-trial indictee. Such a view ignores the modern role of federal habeas corpus review of state criminal proceedings as closely akin to appellate review.

From the earliest, the Judiciary Act of 1789 contemplated that the Supreme Court and lower federal courts had authority to issue writs of habeas corpus only in aid of individuals detained in allegedly unlawful federal custody. This practice held until, following the Civil War, Congress enacted the Habeas Corpus Act of 1867, which expanded power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States." 14 Stat. 385. *See generally* L. Yackle, *Postconviction Remedies*, § 19 at 85-86 (1981). For the next 80 years, federal habeas review of state prisoners' claims remained limited in nature and scope.

Since the landmark decision in *Brown v. Allen*, 344 U.S. 443 (1953), federal habeas corpus review of state criminal convictions has grown rapidly in scope, leaving as a distant memory the narrow jurisdictional inquiry that previously limited federal habeas corpus review.

Important new ground was broken in the *Brown* case. For the first time, the *Brown* court expressly

held that all federal constitutional questions are cognizable in federal habeas corpus. Additionally, the court made clear that federal courts are not bound by state court judgments on federal issues in habeas cases even if those federal claims were "fully and fairly" litigated in state court. 344 U.S. at 458. Moreover, *Brown* recognized the discretionary power of a federal habeas court to hold factual hearings, when appropriate, even in the face of claims that the state proceedings were adequate and the findings of fact correct. 344 U.S. at 464-65.

Ten years later, the decisions in *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963) helped to establish federal habeas corpus review as a general post-conviction remedy for prisoners convicted in either state or federal court. *Noia* eliminated procedural barriers to federal habeas review by holding that a petitioner need not seek certiorari review in the Supreme Court before petitioning in federal district court for habeas relief and that a state court procedural default by petitioner would not bar habeas consideration of a federal claim in the absence of a deliberate bypass of state remedies. 372 U.S. at 439. In *Townsend*, the Court set forth the standards, later codified into 28 U.S.C. § 2254, which govern the effect to be given to state court findings of fact. 372 U.S. at 313.

These and other cases have transformed federal habeas corpus review of state criminal proceedings from a narrowly focused jurisdictional inquiry into a general post-conviction remedy, akin to, though not identical with, appellate review. This new role for habeas should inform the Court's interpretation of the "sparsely worded" Rule 23(c). Thus, a State prisoner

who successfully petitions for a habeas writ in federal district court is more properly analogized to a convicted defendant whose conviction has been called into question on appeal than to a pre-trial indictee.

In *Carter v. Rafferty*, relied upon heavily by the courts below and respondent, the Third Circuit, without explanation or citation to authority, classified a successful habeas petitioner as being in the position as "any other state-indicted, not yet tried individual." 781 F.2d at 998. Petitioners submit that the better approach, given the widespread use of habeas, and the broad scope of review of virtually any claim that can be couched in Federal constitutional terms, is to consider the successful petitioner akin to a respondent in an appeal filed by the State. While Rule 23(c) may indeed be "sparsely worded," there is nothing in its text which would require federal courts to foreclose all consideration of the dangerousness of an individual who may be released. Indeed, its interpretation should be informed by recognition of this greatly expanded role. The presumption of release in the rule is not irrebutable. A prisoner shall be enlarged "unless the court . . . shall otherwise order." Fed. R. App. P. 23(c).

It is unrealistic to blindly compare successful petitioners in district court to pre-trial indictees. The common practice has been to treat these petitioners as similar to applicants for bail pending appeal. For example, in *Shaffer v. Clusen*, 518 F. Supp. 936 (E.D. Wis. 1981), the court granted a writ to a prisoner convicted in state court of second degree murder and attempted armed robbery. The order went on to provide, however, that "the execution of the writ will be stayed pending the results of the appeal." 518 F.

Supp. at 965. *See also United States ex rel. Rice v. Vincent*, 486 F.2d 215 (2d Cir. 1973), *Kennedy v. Pinkney*, 473 F. Supp. 1279, 1285 (C.D. Ill. 1979), and *Rudolph v. Powell*, 478 F. Supp. 849 (E.D. Wis. 1979).

This approach has much to recommend it, including a recognition that in many cases it will not be possible to re-try the successful habeas petitioner because of the passage of time, the unavailability of witnesses, the exclusion of key evidence, or other reasons. Preservation of the status quo pending appeal, especially where there is a likelihood of success on appeal, is more appropriate given these considerations. Furthermore, the comparison to a pre-trial indictee is incorrect in the sense that if the federal district court decision is overturned on appeal, a new trial does not occur; the valid state conviction stands.

Respondent asserts that a restrictive reading of Rule 23(c) promotes federalism and comity because it requires federal courts to refrain from "interfering with matters traditionally and properly reserved for action by states themselves." (Rb-21). This Court has consistently recognized the strain that federal habeas proceedings can put on comity, *see, e.g., Fay v. Noia*, 372 U.S. at 418-20, and has attempted to minimize that strain by creating rules which do not have the effect of nullifying completely state criminal proceedings.

A rule which has the effect of precluding the State from appealing an adverse district court ruling scarcely can be said to promote federalism. Should the *Carter* rationale stand, a federal court which grants habeas corpus relief will force the state to a choice between unleashing potentially dangerous in-

dividuals on the community while prosecuting an appeal or foregoing appellate review. The argument that the petitioner's release does not involve a federal interest ignores the fact that he has been released by the federal courts based on federal law and the United States Constitution and that the state's right to appeal issues of this type has been provided by the United States Congress. To assert that considering the dangerousness of a petitioner is not a federal interest makes it appear that federal courts have no valid concern for the safety of the communities in which they sit.

Judicial myopia of this sort hardly helps build public confidence in the federal legal process since it is readily perceived as cavalier disregard for the possible consequences of a judicial decision to grant the writ. The suggestion by respondent that the State's own courts can make the finding of dangerousness (Rb-21) is erroneous in some respects and disingenuous in others. Clearly, the type of dangerousness that would justify civil commitment, as suggested by the *Carter* court, 781 F.2d at 996, will arise so infrequently as to be meaningless in this context.

Additionally, there is yet another key federal interest—uniform application of federal law—which is ill-served by a rule which effectively cuts off meaningful appellate review of district courts.

The *Carter* decision noted with apparent approval the practice of granting "conditional writs" under the terms of which States may re-try habeas petitioners within a certain period of time or release them. 781 F.2d at 994. *See also United States ex rel. Thomas v. State of New Jersey*, 472 F.2d 735 (3d Cir. 1973). Respondent concedes, citing *Carter*, the legality of

these conditional writs, although there is nothing in Rule 23 which refers to them. Apparently there are no standards governing the issuance of these writs. If indeed the "sparsely worded" Rule 23 authorizes these writs, it does not require a lyric leap to find within the Rule the power of a federal court to consider the dangerousness of an individual when deciding whether to stay release pending appeal.

Petitioners assert that 28 U.S.C. § 2243, which commands the court to "dispose of the matter as law and justice require," mandates that all relevant factors, including dangerousness and likelihood of success on appeal, be considered.

POINT II. THE ISSUES PRESENTED ARE NOT MOOT

Respondent, in Point Two of his brief, claims that this is an inappropriate case for resolution of the issues raised by the parties since this case either is or will become moot before it is decided by this Court. Recent developments in the Third Circuit Court of Appeals have conclusively resolved this issue in favor of petitioners.

The basis of respondent's mootness contention is the fact that on December 2, 1986, the Third Circuit affirmed the decision of the district court which granted habeas corpus relief in this case. As evidenced by Appendix A; however, on March 3, 1987, the court of appeals granted petitioners' motion for a panel rehearing on the merits of the appeal and vacated its previous opinion and order. On March 5, 1987 the panel set a rehearing date of April 9, 1987. Thus, the Third Circuit will not consider the merits of the appeal until two weeks after this court hears

argument on the issue of whether a stay pending appeal should have been permitted. The circuit court decision to grant a rehearing, of course, has nothing to do with the issues presented to this Court—the standards for granting a stay of release on habeas corpus pending appeal of the decision granting habeas corpus relief.

Any further argument that this case may become moot prior to a decision by this Court is speculative. Succinctly stated, mootness is no longer an issue in this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit denying petitioners' request to stay respondent's release during the pendency of the State's appeal be reversed.

Respectfully submitted,

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Attorney for Petitioners

JOHN G. HOLL
Assistant Attorney General and Chief of Staff

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DIVISION OF CRIMINAL JUSTICE
ON THE BRIEF

DATED: March 16, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

DANA BRAUNSKILL
v.

GARY HILTON, Superintendent,
New Jersey State Prison,
Trenton, New Jersey and
W. CARY EDWARDS,
Attorney General of New Jersey

(D.C. Civ. No. 85-2008)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM and GARTH, *Circuit Judges.*[1]

The petition for rehearing filed by the State of New Jersey in the above-entitled case having been submitted to the judges who participated in the decision of this Court, the petition for panel rehearing is granted. The not-for-publication per curiam opinion of the panel, filed December 2, 1986, and the judgment entered thereon is hereby vacated.

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[1] Prior to the receipt of the petition for rehearing, Judge Adams retired from the Court. Judge Adams therefore did not participate in the consideration of the petition.

BY THE COURT,

/s/ A Leon Higginbotham
Circuit Judge

Dated: March 3, 1987

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

March 5, 1987

Raymond S. Gurak, Esquire
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Re: Dana Braunskill vs. Gary Hilton etc., et al.
Cary Edwards, etc., et.,
No. 86 5204

Mark H. Friedman, Esquire
Office of the Public Defender
20 Evergreen Place—First Floor
East Orange, NJ 07018

Dear Counsel:

The above-entitled case has/have been listed for rehearing Thursday, April 9, 1987.

This advance notice is provided so that you may make arrangements to be prepared to appear and present argument if it is required. The panel will determine whether there will be oral argument and, if so, the amount of time allocated therefor. (See Third Circuit Internal Operating Procedures, Ch. II.) No later than one week prior to the disposition date, you will be advised whether oral argu-

ment will be required, the amount of time allocated by the panel, and the specific date on which argument will be scheduled.

Kindly acknowledge receipt hereof on the enclosed copy of this letter and advise the name of the attorney who will present oral argument if argument is required by the panel. In addition, please indicate whether or not s/he is a member of the bar of this Court. Membership is not necessary if counsel represents a U.S. government agency or officer thereof or if the party is appearing pro se. If the attorney is not a member of the bar of this Court, an application for admission will be forwarded, which should be completed and returned to this office without delay.

Very truly yours,
SALLY MVROS, Clerk

/s/ RUTH MARTINEZ
Ruth Martinez, Deputy Clerk

rm

Receipt acknowledge by ALLAN J. NODES Date March 9, 1987

Name of attorney arguing ALLAN J. NODES

Representing: Appellant/Petitioner ( ) Intervenor ( )
Appellee/Respondent ( ) Amicus ( )

Member of Bar: Yes __x__ No _____

MOTION FILED
DEC 31 1986

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, et al.,

Petitioner,

—v.—

DANA BRAUNSKILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Civil Liberties Union, the American Civil Liberties Union of New Jersey, the National Association of Criminal Defense Lawyers and the Association of Criminal Defense Lawyers of New Jersey hereby respectfully move for leave to file a brief annexed hereto as Amici Curiae in this case. Respondent has consented to the filing of this amicus brief. Petitioners have not responded to Amici's request for consent.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members; the ACLU of New Jersey is one of its state affiliates. The ACLU has been particularly active in preserving and defending the procedural vehicle of federal habeas corpus and the full reach

of the Bill of Rights as applied to those accused of crime.

The National Association of Criminal Defense Lawyers is a nationwide organization consisting of 4200 lawyers primarily engaged in the defense of criminal defendants in both the state and federal courts. It has an interest in protecting the basic procedural and constitutional rights of the clients of its members which are implicated by the instant case.

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a statewide organization of criminal defense lawyers (both private bar and public defenders) who practice in both the state and federal courts. Founded in 1985 "to protect and insure by rule of law those individual rights guaranteed by the New Jersey and the United States Constitutions," ACDL-NJ has participated as amicus in the New Jersey

Supreme Court. Beyond its general interest in the protection of individual rights within the state and federal system, ACDL-NJ is particularly concerned about the impact of this habeas decision on the New Jersey system of criminal justice.

It is therefore respectfully requested that the Amici be granted leave to file this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which raises important questions dealing with federal habeas corpus and the right to release of unconstitutionally convicted state prisoners.

Dated: New York, N.Y.
December 31, 1986

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INTEREST OF AMICI

The Statement of the interest of amici is contained in the Motion for Leave to file a Brief as Amici Curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates important principles of federalism in the application of the criminal law, an issue that has concerned this Court to a greater and greater degree in recent years. The rule established by the Third Circuit in Carter v. Rafferty, 781 F.2d 993 (3d Cir. 1986), and applied in this case, has accomodated the maximum state interest in preserving and applying its own procedural rules relating to the release on bail of a state prisoner whose conviction has been overturned on federal habeas corpus. It permits the most extreme deference to the bail and release policies of a state by requiring the state to return to its own courts to apply its own detention rules to the state prisoner while the case is on appeal in the federal system. The Carter rule declares in effect that, since the effect of

the grant of the writ is to wipe out the force of the original conviction, a state's policies on bail and release of a defendant or prisoner must be applied when dealing with a successful habeas corpus petitioner in the same way and to the same extent that the state courts would treat an indicted but not convicted defendant.

However, the New Jersey Attorney General and the Solicitor General have urged a rule upon this Court that would turn federalism on its head and impose a uniform federal requirement on the states that might conflict with important state principles and rules to the contrary. Thus, although the State of New Jersey has declared as a matter of state policy that the potential dangerousness of an accused defendant cannot be the basis for incarcerating him before trial, see N.J. Ct. R. 3:26-1(a) and State v. Johnson, 61 N.J.

351, 160 (1972) 1. the petitioners here insist that that state policy should be ignored when the same state prisoner has successfully overturned his conviction on constitutional grounds in federal court. Under their theory, the federal courts dealing on federal habeas corpus with New Jersey's incarceration of its state prisoners would consider -- presumably as a decisive factor -- that which the New Jersey courts cannot consider as a basis for imprisoning a defendant pending his conviction in the state system.

In the name of federalism, the petitioners and the United States as amicus

1. It should be noted that New Jersey is itself debating the issue of whether the safety of the community should be a factor in determining the pre-trial release of an accused. A recent bill, New Jersey Assembly Bill, A. 2113, Bail Act of 1986, would allow considerations of dangerousness to be taken into account when setting bail. If the bill passes, then obviously under the Carter rule, the state courts would then be permitted to consider that factor when dealing with a successful habeas petitioner.

would ignore state rules and trammel state policies, all in favor of some elusive uniformity that itself may violate the Constitution, see discussion below of United States v. Salerno, 794 F.2d 64 (2d Cir. 1986) cert. granted 55 U.S.L.W. 3315 (November 4, 1986). But this approach would seem to show a concern with, and be supportive of, federalism only when the state rule is more restrictive of a defendant's rights than the federal rule would be; when a state's rules or policies are more protective or solicitous of the rights of an accused, then federalism would be ignored and a uniform federal rule established at a more restrictive level than that which the state would impose. Because the rule urged by the Petitioner and the Solicitor General is counter to this Court's continued concern that federal courts should not oust the states' rightful application of their own procedural rules in the criminal

law, particularly on federal habeas corpus (exemplified most forcefully in Wainwright v. Sykes, 433 U.S. 72 (1977)), their arguments should be rejected and the decision below should be affirmed.

ARGUMENT

I. FEDERAL COURTS SHOULD NOT CONSIDER DANGEROUSNESS AS A BASIS FOR NOT RELEASING A SUCCESSFUL HABEAS CORPUS PETITIONER UNLESS THE STATE COURTS WOULD REFUSE BAIL ON THAT BASIS TO AN INDICTED BUT NOT YET CONVICTED DEFENDANT

A. A Successful Habeas Corpus Petitioner in the District Court Should be Treated as an Indicted But Not Yet Convicted State Defendant.

Crucial to the state's position on this appeal is the astonishing argument that a prisoner who has been successful on a habeas corpus petition at the district court level is different from a person indicted but not yet tried in the state courts, a position that the Carter court explicitly rejected,

781 F. 2d at 998. That argument ignores the effect of the federal court ruling that constitutional error has occurred and that the individual has been deprived of his liberty without due process of law. To say that the ruling is "only" that of a district court judge which can be reversed on appeal is to ignore two basic tenets of our federal system: (1) the force and effect of the Supremacy Clause which declares that the Constitution is the supreme law of the land and state judges are bound thereby; and (2) the long established rule that "the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18 (1958). It follows that, unless and until its decision is reversed, the federal district court speaks for "the federal judiciary" whose interpretation of the Constitution must govern the case before it. And when it decides that a conviction

violated the Constitution, all state officials "are bound thereby."

That is certainly the philosophy behind the presumption in favor of release of a successful habeas corpus petitioner at the district court level which all parties acknowledge is mandated by Rule 23(c). The reason for such a presumption is that the decision declaring the conviction illegal and void under the Constitution must be given strong effect in the only way that matters to the successful litigant -- namely, by releasing him from his presumptively illegal and unconstitutional confinement. The assumption on which the rule is based is totally inconsistent with the state's assertion here that it is "only" the decision of a single judge which somehow does not matter and can be ignored until higher courts have spoken.

As the Carter court recognized, once the conviction is declared void by the district court, the status of the petitioner is precisely that of an indicted but not yet convicted defendant in the state system. A conviction obtained in violation of the Constitution "is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment," Ex parte Siebold, 100 U.S. 371, 376-77 (1879).

B. The Effect of Salerno.

The preliminary issues raised on this appeal overlap those raised in United States v. Salerno, 794 F.2d 64 (2d Cir. 1986), cert. granted, 55 U.S.L.W. 3315(November 4,1986) which will be argued before this case is heard. If this Court affirms the Second Circuit decision and holds that the Bail Reform Act violates the Constitution insofar as it permits pretrial detention of a federal defendant on the ground that his release

would pose a danger to the community or any person, see Brief of Amici Curiae, American Civil Liberties Union, New York Civil Liberties Union, and Civil Liberties Union of Southern California, United States v. Salerno, No. 86-87, then that same holding would apply to a state prisoner whose conviction has been vacated on constitutional grounds on federal habeas corpus.

However, a holding in Salerno that the Bail Reform Act constitutionally permits preventive detention of federal defendants pending trial would not predetermine the issues in this case. Even if Congress might constitutionally impose a requirement that general dangerousness might be considered as a basis for detention of a federal defendant by a federal court, Congress has imposed no such requirement with respect to state prisoners coming into federal court on a habeas corpus petition. Indeed, as we

explain below, the only federal rule on the subject, Fed. R. App. P. 23(c), indicates that release should be the norm when a petition has been granted, unless some special factor counsels otherwise. And if the laws and policy of the state that secured the conviction and holds the defendant does not provide for -- or prohibits -- consideration of potential danger as a basis for incarceration, the constitutionality of the provisions of the federal Bail Reform Act certainly does not in any way require this Court to impose the same requirement on the States. Moreover, until Congress authorized preventive detention in the Bail Reform Act, the federal courts had never asserted any authority to detain individuals solely on the basis of dangerousness; thus, no power inheres in a federal court to impose any restraint on an individual it deems to be held unconstitutionally beyond that

authorized by Rule 23(c). Thus while a decision upholding the result below in Salerno would militate in favor of affirmance in this case as well, the reversal of Salerno would in no way effect the Third Circuit rule at issue here.

C. The Presumption in Favor of Release.

The various parties to this appeal agree on three basic propositions:

(1). Under Rule 23(c), it is presumed that a successful habeas corpus petitioner will be released pending any appeal in his case (Brief of Petitioners on the Merits at 17). See also United States ex rel. Thomas v. State of New Jersey, 472 F.2d 735, 743 (3d Cir. 1973)("...there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody.")

(2). If the federal court believes that there is a significant risk of flight so

that the petitioner would not respond to federal court orders, release need not be required, Carter, 781 F.2d at 995.

(3). Following the grant of a writ vacating a conviction on constitutional grounds, as affirmed through the federal system, the state courts may impose whatever bail restrictions it normally imposes on persons indicted but not yet convicted of a crime.

What the Third Circuit has done in Carter and in this case is to advance the state court's power to act from the stage when all appeals have been completed to the stage where the district court has acted to grant the writ and the case is still on appeal. It did so in an effort to reconcile the heavy presumption in favor of release recognized by all courts (and acknowledged by the parties) in the light of the past history of the rule, already described in the other

briefs. And the Third Circuit also imposed this rule in light of its view that dangerousness is "traditionally [a] state concern[]," Carter, 781 F.2d at 998, that should be examined by the state courts in accordance with their usual procedures for dealing with indicted individuals.

The State of New Jersey, supported by the United States as amicus, seeks here to shirk the responsibility for its own criminal laws and policies to which the Court of Appeals deferred. Before this Court, the state urges a general federal rule that allows the federal courts to consider dangerousness regardless of the state rule in effect in the jurisdiction from which the writ was granted. That proposal has neither history nor logic to support it.

In the first place, the heavy presumption in favor of release of a successful habeas corpus applicant flows from

the very nature and purpose of the writ itself: "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty," Jones v. Cunningham, 371 U.S. 236, 243 (1963). If a writ has been granted, that means that the petitioner has been imprisoned in violation of his constitutional rights. Every day that he remains imprisoned is a further illegal incarceration.

Secondly, the judgment of the district court that a constitutional error has occurred must be given appropriate recognition. Indeed in the overwhelming majority of cases, a district court decision on a state prisoner's habeas corpus petition is affirmed on appeal. See Table B-5, Annual Report of the Director of the Administrative Office of the U.S. Courts during the Twelve Month ended June 30, 1986 (entry on "private prisoner petitions," involving actions

brought both under Section 2254 and 42 U.S.C. Section 1983) 2.

These figures indicate that any rule that would denigrate or ignore the effect of a district court decision that constitutional error has occurred -- by refusing to release the prisoner based on the state's normal pretrial detention rules while the case is pending on appeal, on the theory that the state will be likely to obtain a reversal -- cannot be accepted. It would only seriously

---

2.According to information provided to Amici on December 30, 1986 by the non-criminal branch of the Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, in fiscal year 1986 there were 992 state prisoner habeas cases decided on the merits in the Courts of Appeal; in only 154 of these cases was the district court determination reversed in whole; and in an additional 26 cases the district court decision was reversed in part. Thus in only 18.1% of the state prisoner habeas corpus petitions brought under Section 2254 was a district court decision reversed on appeal. The Administrative Office was unable to determine based on its statistics whether the rate of reversal on appeal is different when the writ was granted by the district court or when it was denied.

prejudice the successful petitioner by depriving him of his liberty for the period of time that the case is pending on appeal. There is no countervailing risk of prejudice to the state, for, to the extent that the state would otherwise be able to incarcerate an indicted individual pending trial, according to its own rules, those rules could be applied to the petitioner while his case is pending on appeal, as the Third Circuit has held. Indeed in this case, the Court of Appeals affirmed the grant of the writ on December 2, 1986. If the State's bland assertions -- which would be totally unprovable beforehand -- that it would be successful on appeal and the petitioner was dangerous had been accepted by the district court, then petitioner would have been imprisoned unnecessarily for an additional seven months for no purpose. Any rule that

leads to such a result leaves much to be desired.

Thirdly, there is a vast difference, on the one hand, in situations such as that involved here and in Carter, where genuine issues of guilt or innocence are presented, see Carter v. Rafferty, 621 F. Supp. 533 (D.N.J. 1985)) and the constitutional error is great and, on the other, situations such as that presented in Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985), where the evidence of guilt was overwhelming and the petitioner offered to plead guilty while the case was pending in which case the motive to flee would be great and the Carter rule would justify restraint in such a case.

Fourthly, it is difficult to accept the state's position that it somehow faced with a Hobson's choice of foregoing its right to appeal the grant of a habeas petition if it wants to continue to incarcerate a state

prisoner. There is nothing in the Carter rule that creates such a dilemma. While an appeal is pending, the state must apply its own bail rules to the petitioner. Questions of release are totally seperate from questions of appeal and retrial, each of which must be considered in its own light. It is the state which improperly tries to combine the two.

In any event, it is difficult to see why the state is prejudiced when its own rules are being applied in its own state courts to its own state prisoners. If its own rules prohibit the consideration of dangerousness as a factor justifying restraint, then it certainly should not ask the federal courts to apply such a standard to state prisoners.

II. THE SOLICITOR GENERAL'S SUGGESTION THAT THE STAY PROVISIONS OF RULE 8 FED. R. APP. P. SHOULD APPLY MUST BE REJECTED SINCE A HABEAS CORPUS PETITION CANNOT BE TREATED THE SAME WAY AS A CIVIL APPEAL

The Solicitor General in his brief arrives through a different route than that taken by the state to the conclusion that potential dangerousness should be considered as a factor in the release of a habeas corpus petitioner. He arrives at that conclusion through the following argument: (1) a habeas corpus petition is a civil case; (2) in all civil cases, the order of a district court can be stayed pending appeal if a four-fold test -- likelihood of success, irreparable injury to moving party, injury to prevailing party and the public interest -- is met; (3) the public and the state have an interest in not releasing a potentially dangerous defendant and that factor must weigh heavily in not releasing a successful habeas petitioner.

Each part of the Solicitor General's argument is seriously flawed.

In the first place, habeas corpus may be a "civil" proceeding for some purposes, but this Court has made clear that the normal civil rules cannot be carried over carte blanche into the habeas area. See Harris v. Nelson, 394 U.S. 286, 294 (1969). Indeed Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts specifically notes that the Federal Rules of Civil Procedure may be applied to habeas corpus petitions "to the extent that they are not inconsistent with these rules" and only "when appropriate." By analogy, in applying the Rules of Appellate Procedure, where there is a specific rule, such as Fed. R. App. P. 23(c) dealing precisely with release of a successful habeas corpus petitioner while on appeal and creating a heavy presumption in favor of release, then the more general considerations of Rule 8, which apply to labor injunctions or commercial disputes and

similar cases, cannot be imported into habeas proceedings.

Secondly, even if some of the same Rule 8 factors could be applied in this situation, they cut against the Solicitor General's argument. In the first place, the statistics discussed above show that the probablity of district court decisions on habeas corpus being overturned on appeal is generally quite low -- only 18.1%. That militates against the establishment of any rule that would generally allow, or make easier, the continued incarceration of a successful habeas petitioner.

Thirdly, the state can hardly show that it will suffer irreperable injury when its own state rules on release of an indicted but not convicted defendant will be applied to a habeas petitioner. The State of New Jersey is asking for something "extra" which its own state courts would not grant it, namely,

incarceration of a prisoner based on dangerousness after his conviction has been overturned on constitutional grounds.

Fourthly, the injury to the prevailing party below -- the successful state prisoner -- is patent. He will be deprived of his constitutional right to liberty while the appeal is pending, an interest that the Solicitor General himself concedes should be "weighed heavily."

Finally the public interest requires that the state apply its own rules on the subject of release. If a state has decided as a matter of its own public policy that state courts should not consider dangerousness as a factor in deciding whether to release an accused defendant, there would seem to be no reason why that factor should be considered by the federal courts in holding a state

prisoner once the conviction has been overturned. 3.

CONCLUSION

For the reasons stated above, the decision below must be affirmed.

3.The Solicitor General's suggestion that the federal courts should decide all release questions concerning release of habeas petitioners until the matter is finally disposed of has a surface plausibility. Thus, this Court might consider an intermediate position that the federal courts should retain control of the case, including all decisions on release, but they must apply the same standards of release as the state in which the conviction occurred. It is certainly not unusual for a federal courts to apply state procedural rules in the habeas corpus area -- see e.g., Rose v. Lundy, 455 U.S. 509 (1982) dealing with the requirement of exhaustion and Wainwright v. Sykes, 433 U.S. 72 (1977) dealing with the application of state procedural default. But what federal courts cannot do is to incorporate standards of release which the state has itself rejected as a basis for handling its own criminal defendants.

Respectfully submitted,

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MOTION FILED
MAY 16 1987

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No. 86-108

In The
Supreme Court of the United States
October Term, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

PETITIONERS' MOTION TO FILE SUPPLEMENTAL BRIEF AND APPENDIX

PETITIONERS' SUPPLEMENTAL BRIEF AND APPENDIX

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10 pp

DOCKET NO. 86-108

Gary Hilton, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. Cary Edwards, Attorney General
of New Jersey,

Petitioners,

-vs.-

Dana Braunskill,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND APPENDIX

Petitioners, Gary Hilton, *et al.*, hereby respectfully move for leave to file a supplementary brief and appendix to bring to the Court's attention relevant events which have occurred subsequent to oral argument in this case.

Specifically petitioners wish to advise the Court that on April 30, 1987, respondent was arrested on charges of aggravated assault on a police officer. This event impacts on respondent's dangerousness, an issue which has been contested by the parties throughout this litigation. Moreover, this incident would affect respondent's parole status and could dramatically affect the length of time which respondent would be required to serve if either a stay of his release from custody is granted or the decision to grant habeas corpus is reversed on the merits.

Since this event could have an impact on this Court's decision, petitioners request permission to file the attached supplemental brief and supplemental appendix.

Respectfully submitted,

John G. Holl
Assistant Attorney General

No. 86-108

In The

Supreme Court of the United States

October Term, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
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PETITIONERS' SUPPLEMENTAL BRIEF

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On the Supplemental Brief

QUESTION PRESENTED

1. Does respondent's arrest subsequent to oral argument in this case present additional evidence of his dangerousness which can be considered by this Court and/or the District Court in determining whether a stay of his release on habeas corpus should be granted?

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STATUTES CITED

N.J.S.A. 30:4-123.60. Violation of condition; penalities; revocation of parole; new criminal charges; detention; revocation proceedings; revocation on conviction

a. Any parolee who violates a condition of parole may be subject to an order pursuant to section 17 of this act[1] providing for one or more of the following:

(1) That he be required to conform to one or more additional conditions of parole; (2) That he forfeit all or a part of commutation time credits granted pursuant to R.S. 30:4-140.

b. Any parolee who has seriously or persistently violated the conditions of his parole, may have his parole revoked and may be returned to custody pursuant to sections 18 and 19 of this act.[2] The board shall be notified immediately upon the arrest or indictment of a parolee. The board shall not revoke parole on the basis of new criminal charges which have not resulted in a disposition at the trial level except that upon application by the prosecuting authority, the chairman of the board or his designee may at any time detain the parolee and commence revocation proceedings pursuant to sections 18 and 19 of this act when he determines that the new charges against the parolee are of a serious nature and it appears that the parolee otherwise poses a danger to the public safety. In such case, a parolee shall be informed that, if he testifies at the revocation proceedings, his testimony and the evidence derived therefrom shall not be used against him in a subsequent criminal prosecution.

c. Any parolee who is convicted of a crime committed while on parole shall have his parole revoked and shall be returned to custody unless the parolee demonstrates, by clear and convincing evidence at a hearing pursuant to section 19 of this act, that good cause exists why he should not be returned to confinement.

———o———

STATEMENT OF THE CASE

Petitioners rely on the statement of the case contained in their merits brief.

———o———

LEGAL ARGUMENT

Respondent's arrest subsequent to oral argument should be considered by this Court.

On April 30, 1987, respondent was arrested on charges of aggravated assault on a police officer. This arrest involved firing a .25 caliber handgun at the officer. (App. A) Although respondent has not yet been indicted on this charge petitioners believe that his arrest provides relevant additional evidence of his dangerousness.

Petitioners have argued throughout the course of this litigation that respondent is dangerous and that this dangerousness is a factor which should have been taken into account by the lower courts in response to petitioners' motion to stay respondent's release on federal habeas corpus grounds. Respondent has argued, *inter alia,* that his dangerousness has not been demonstrated. We believe that evidence of respondent's recent arrest on an extremely serious charge is further evidence of his dangerousness. We also believe that this evidence should be taken into account by this Court if it decides to determine whether a stay should have been granted or, by the district court, if the case is remanded.

Moreover, at oral argument this Court asked the parties how much longer respondent would have remained in custody if a stay of his release had been granted. At that time the parties acknowledged that respondent would have

remained in custody for approximately an additional eight months prior to his release on parole. Under New Jersey law, respondent's arrest may have led to a revocation of his parole if habeas corpus had not been granted. N.J. Stat. Ann. sec. 30:4-123.60.b.(West 1982). This revocation would have increased the length of continued incarceration by approximately three years.

CONCLUSION

Based on the foregoing arguments petitioners respectfully request that this Court reverse the order of the lower court and either stay respondent's continued release or order the case remanded to the district court for further hearings.

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Attorney for Petitioners

By: .....
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Of Counsel &
On the Supplemental Brief

APPENDIX

Police Department Incident Report Newark, N.J.

Fill out complete report when listed in classification list and report guide as 802 (no asterik). Do not fill out shaded portion when listed 802 * (with asterik).

1. Victim's or Complainant's Name—P. O. Lawrence Lewis; 2. Telephone No.—733-7940; 3. Residence Number—32 Franklin St., Newark, N.J.; 4. Sex—M; 5. Race; 6. Age; 7. Occupation—Police Officer; 8. Injury—[ ] Yes [ ] No; 9. Sobriety of Victim—[ ] Sober; [ ] Had Been Drinking [ ] Intoxicated; 10. Can Vict. Ident Offender—[ ] Yes [ ] No; 11. Person Reporting Crime—Same as #1; 12. Telephone No.—Same as #2; 13. Residence of Person Reporting Crime—Same as #3; 14. Time Rep't—2230; 15. Month—4, Day 30, Year 87; 16. Occurred on View—[X] Yes [ ] No; 17. Statute or Ordinance—2C:12-1; 18. Sector—215; 19. District—N-9360; 20. Cent. Complt No.—34945; 21. Reporting Officer (Name)—P. O. L. Lewis (Badge No.)—1566 (Commd.)—Intelligence Sq.; 22. Incident—Aggravated Assault on Police; 22A. Occurred On Public Housing Property?—[ ] Yes [ ] No; 23. Location—430 Broad St.; 24. Time of Occurence (On or Bet.)—Hour—2230 Day of Week—Thru. Month—April Day—30 Year—87; 25. Was Force Used?—[X] Yes [ ] No [ ] Not Known; 26. Was a Weapon Used?—[X] Yes [ ] No [ ] Not Known; 27. Type of Premises or Property Attacked—Person on streets; 28. How Attacked—Shot At Police Officer; 29. Means of Attack—With 25 Automatic Gun 30. Object of Attack—Physical Force; 31. Modus Operandi—; 32. Vehicle Involved In Crime—[ ] Stolen [ ] Used By Offender Year Make Lic. Number Color Body Type Serial Number; 33. Name of Suspect—Dana Terrance Braunskill (Alias) (Residence) Sex—M, Race—B, Age—28, Height—5'11, Weight—175, Color of Hair—Blk., Color of Eyes—Brn., Describe Clothing Worn and Peculiarities—Silver Jacket; 34. Additional Information (Do Not Repeat Information Listed In Numbered Blocks)—An unidentified B/M approached me and stated that the above described male had a gun in his jacket pocket. I approached the suspect and told him that

I was a Newark Police officer and to take his hands out of his pockets. Suspect had both hands in his pocket. Suspect told officer that he did not care who I was and for me not to touch him. Officer grabbed suspect by the arm and he pushed officer in the chest and pulled the gun out of his pocket and fired one round at officer, then ran toward Broad St. Due to the traffic officer fired two rounds over suspects head, suspect ran across the streets turned and fired another round at officer. Officer returned the fire by firing two more rounds. Suspect kept running toward the Lackwanna railroad station. The Lackwanna Transit police gave chase and apprehended the suspect with the silver 25 automatic revolver. Suspect was given his rights and taken to the robbery squad and arrested on the above charge and other charges. See other reports for details. Det. John Smith and Detective Thomas Hackney from the Robbery Sq. along with Sgt. Padilla from the North Dist. responded to the scene.

34A. Stranger to Stranger Crime—[X] Yes [ ] No[ ] Unknown; 34B. Outlaw Len.; 34C. Report Source:—1. [1] Dispatch 2. [ ] Phone 3. [ ] Walk-in 4. [ ] Other; 35. Estimated Value By Type of Property—A. Currency B. Jewelry C. Furs D. Clothing E. Local Autos F. Miscellaneous G. Total; 36. Other Officers At Scene—(Name) Veh. No. Command Badge No. Rank: 37. Other Reports Submitted—[ ] DP 1:152 Property [ ] DP 1:152-1 Auto [ ] DP 1:225A Statement [X] DP 1:796 Cont. [ ] DP 1:800 Arrest; 38. Persons Arrested (Name)—Dana Terrance Braunskill, Cent. Apr. No.—7732; 39. Witnesses (Name and Residence) (Telephone No.)—Harkeem 430 Broad St. Lincoln Hotel Rm. 284; 40. Teletype Alarm Number—; 41. Name of Detective Notified—; 42. Signature of Reporting Officer—/s/ Lawrence J. Lewis; 43. Status of Offense—[ ] Unfounded [X] Cleared By Arrest [ ] Not Cleared [ ] Exceptional Clearance; 44. Cleared By Arrest Of: (Check Appropriate Box or Boxes: [X] Adult [ ] Juvenile [ ] Adult and Juvenile [ ] Narcotic Offender; 45. Status of Case [X] Pending Active [ ] Pending Inactive

[ ] Closed; 46. Class—041; 47. Re-Class—; 48. Key-Punched By:—; 49. Verified By—; 50. Supervisor Approving a Classifying:—/s/ Sgt. Michael Dominick, (Date) 4-30-87; 51. Time Approved—; 52. Indexed By:—; 53. Number of Pages—;

DPI: 802.4-84 75M Appendix A

Record & Identification Bureau File Copy

Police Department Continuation Report Newark, N.J.

Specific Offense—Aggravated Assault On A Police Officer; Dist. Complt. No.—N-9360; Central Complaint No.—34945; Statute or Ordinance (RS NJS Rev. Ord.)—2C:12-1; Location of Offense—430 Broad St. (In Parking Lot); Date of Ordinance—4/30/87;

Amended Property Valuation—A. Currency B. Jewelry C. Furs D. Clothing E. Local Auto F. Miscellaneous G. Totals; Rank Signature of Officer Submitting Report—Det. /s/ Laurence T. Lewis, Command—Intelligence Sq. Badge Nmber—1566; Status of Offense—[ ] Unfounded [X] Cleared By Arrest [ ] Not Cleared [ ] Exceptionally Cleared, Status of Case: [X] Pending Active [ ] Pending Inactive [ ] Closed; Cleared By Arrest Of [X] Adult [ ] Juv & Adult [ ] Narcotic Offender; Classification: —041; Reclassification—; Read Classified and Approved By /s/ Michael Dominick; Date—4-30-87; Tallied By:—; Indexed By:—; Filed By:—; Page Number:—; No. of Pages—;